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CHARLES ELMORE
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In the Supreme Court of the United States

OCTOBER TERM, 1929.

No. 12, ORIGINAL. IN EQUITY.

THE STATE OF CONNECTICUT,
Complainant,

v.

THE COMMONWEALTH OF MASSACHUSETTS,
Defendant.

MOTION OF THE COMMONWEALTH OF MASSACHUSETTS TO AMEND ANSWER TO THE BILL OF COMPLAINT.

JOSEPH E. WARNER,
Attorney General of Massachusetts.

BENTLEY W. WARREN,
Special Assistant Attorney General of Massachusetts.

GERALD J. CALLAHAN,
Assistant Attorney General of Massachusetts.

R. AMMI CUTTER,
Assistant Attorney General of Massachusetts.

In the
Supreme Court of the United States

OCTOBER TERM, 1929.

No. 13, ORIGINAL. IN EQUITY.

THE STATE OF CONNECTICUT,
Complainant,

v.

THE COMMONWEALTH OF MASSACHUSETTS,
Defendant.

NOTICE.

To the State of Connecticut, the complainant herein; to the Honorable Benjamin W. Alling, Attorney General of said State; and to Ernest L. Averill, Esq., and to Benedict M. Holden, Esq., both of Hartford, Connecticut, of counsel in said case:

Please take notice that at the incoming of the Supreme Court of the United States at twelve o'clock noon at the Capitol Building in the City of Washington, District of Columbia, on Monday, November 4, 1929, or as soon thereafter as counsel can be heard, the abovenamed defendant will appear by its attorneys and present to said court the attached motion for leave to file a motion to amend the defendant's answer.

THE COMMONWEALTH OF MASSACHUSETTS,

By JOSEPH E. WARNER,
Attorney General of Massachusetts.

BENTLEY W. WARREN,
Special Assistant Attorney General of Massachusetts.

GERALD J. CALLAHAN,
Assistant Attorney General of Massachusetts.

R. AMMI CUTTER,
Assistant Attorney General of Massachusetts.

THE STATE OF CONNECTICUT.

COUNTY OF

Service of the above notice by the delivery to me of a copy thereof, together with a copy of a motion for leave to file and a motion to amend the defendant's answer is hereby acknowledged this day of October, 1929.

In the
Supreme Court of the United States

OCTOBER TERM, 1929.

No. 13, ORIGINAL. IN EQUITY.

THE STATE OF CONNECTICUT,
Complainant,

v.

THE COMMONWEALTH OF MASSACHUSETTS,
Defendant.

MOTION OF THE COMMONWEALTH OF MASSACHUSETTS FOR LEAVE TO FILE MOTION TO AMEND ANSWER TO THE BILL OF COMPLAINT.

And now comes the Commonwealth of Massachusetts, by Joseph E. Warner, its Attorney General, and moves this Honorable Court for leave to file the attached motion to amend the answer heretofore filed by the said Commonwealth in the above-entitled action.

THE COMMONWEALTH OF MASSACHUSETTS,

By JOSEPH E. WARNER,
Attorney General of Massachusetts.

BENTLEY W. WARREN,
Special Assistant Attorney General of Massachusetts.

GERALD J. CALLAHAN,
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R. AMMI CUTTER,
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In the
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THE STATE OF CONNECTICUT,
Complainant,

v.

THE COMMONWEALTH OF MASSACHUSETTS,
Defendant.

MOTION OF THE COMMONWEALTH OF MASSACHUSETTS TO AMEND ANSWER TO THE BILL OF COMPLAINT.

And now comes the Commonwealth of Massachusetts, by Joseph E. Warner, its Attorney General, and moves this Honorable Court for leave to amend the answer heretofore filed by the said Commonwealth in the above-entitled action by leave of court in the following particulars.

1. By striking out that portion of paragraph 5 of the answer beginning with the words "But the defendant", in the twenty-third line on page six of the answer, and ending with the words "more fully described," in the first and second lines on page seven of the answer, and inserting in place thereof the following:

"But the defendant says

(*a*) that no such permit from Congress, the War Department, the Secretary of War, or the Chief of Engineers is necessary for the erection of any structures as such in a non-navigable river or stream.

(*b*) that the United States Government, the War Department thereof, the Secretary of War, and the Chief of Engineers have jurisdiction over the diversion of waters from non-navigable tributaries of navigable streams solely because such a diversion may result in the obstruction of the navigable capacity of a navigable stream into which such non-navigable stream may flow.

(*c*) that it is the duty of the Secretary of War and the Chief of Engineers to grant a permit for a diversion from a non-navigable stream, unless such diversion will result in an unreasonable obstruction of a navigable stream or will unreasonably alter or modify the capacity of the channel of a navigable water of the United States. The defendant admits that at the time of the filing of the bill of complaint in the proceedings before this Honorable Court the defendant had not obtained permission from the War Department or from the office of the Secretary of War of the United States to do any acts actually done or contemplated to be done by the Commonwealth of Massachusetts, referred to in the bill of complaint, for which any permit may be by law required.

The defendant avers, however,

(*a*) That on November 30, 1927, the Metropolitan District Water Supply Commission made a formal application for a permit to divert water from the Swift river and the Ware river in accordance with the terms of the two acts hereunto annexed and marked 'Appendix A'. No permit was requested for permission to erect any structures in the Swift river or in the Ware river, inasmuch as the said rivers are non-navigable streams and the jurisdiction of the War Department does not extend to regulation of the waters of such streams unless there is such a diversion or use of the waters of such streams as will unreasonably alter or modify the condition or capacity

of the channel of a navigable water of the United States into which such non-navigable streams eventually flow.

(*b*) That after extensive consideration and after public hearings by representatives of the War Department, it was found on March 14, 1928, upon recommendation of the Chief of Engineers and with the approval of the Secretary of War, that the proposed diversion of the waters of the Ware river in excess of 85,000,000 gallons per day (131 cubic feet per second) would have no adverse effect on the navigable capacity of the Connecticut river, and the War Department informed the applicant that no objection would be interposed by the department to the diversion of all flood waters in excess of 85,000,000 gallons per day for the period between October fifteenth and June fifteenth of each year. The application of the Metropolitan District Water Supply Commission of Massachusetts, together with the sixth endorsement thereupon by the Chief of Engineers and the Secretary of War and a copy of a communication submitted to and received by the Metropolitan District Water Supply Commission from the United States Engineer's office at Providence, Rhode Island, are hereunto annexed, marked 'Appendix B,' the said appendix being hereby referred to and made a part hereof.

(*c*) That after extensive consideration and after public hearings it was found by the War Department, upon recommendation of the Chief of Engineers and with the approval of the Secretary of War, on May 11, 1929, that a certain proportion of the diversion of the waters of the Swift river might properly take place without causing any unreasonable, appreciable, or substantial alteration or modification of the condition of, or of the navigable capacity of, the channel of the navigable portion of the Connecticut river, and the Metropolitan District Water Supply Commission

was informed that the War Department would interpose no objection to such a diversion within certain limits. A copy of the application for permission to divert certain waters of the Swift river filed by the Metropolitan District Water Supply Commission, together with the seventh endorsement of the War Department thereon, and a copy of the communication received by the Metropolitan District Water Supply Commission from the office of the District Engineer with respect to said diversion are hereunto annexed and marked 'Appendix C,' to which reference is herein made and which is made a part hereof."

2. By striking out that portion of paragraph 11 of the answer beginning with the words "And further answering," in the fourteenth line on page ten of the answer, and ending with the words "the Secretary of War," in the twenty-second line on page eleven of the answer, and inserting in place thereof the following:

"And further answering the defendant avers that in view of the determination of the Secretary of War, upon recommendation of the Chief of Engineers, that within the limits stated in the annexed findings of the department the proposed diversion of certain of the flood waters of the Ware river and of certain waters of the Swift river contemplated by the said defendant, the Commonwealth of Massachusetts, will have no adverse or injurious effect upon the navigability of the Connecticut river, and in view of the findings of the Chief of Engineers, approved by the Secretary of War, set forth in Appendices 'B' and 'C', attached hereunto and made a part hereof, no question of whether or not any act done or contemplated to be done by the Commonwealth of Massachusetts has or will have an adverse or injurious effect upon the navigability of the Connecticut river is here relevant or

material, in the absence of proof that the Commonwealth of Massachusetts has diverted or actually proposes to divert more water than it is permitted to divert by the terms of the orders of the War Department, inasmuch as the determination of such issues and the protection of the capacity of navigable streams in the interest of interstate and foreign commerce has been committed by the Constitution of the United States to the Congress, which has delegated the greater part of its administrative powers in that behalf to the War Department, to the Secretary of War, and to the Chief of Engineers. The defendant, however, avers that neither the diversions authorized by the Massachusetts legislation, annexed hereunto and made a part hereof and marked 'Appendix A', nor the said diversions as modified in accordance with the terms of the permission contained in the War Department's orders, annexed hereunto and made a part hereof and marked 'Appendix B' and 'Appendix C', will in any way unreasonably alter or modify the navigable capacity of the navigable portion of the Connecticut river; nor will the said diversions either as authorized by the Massachusetts legislation or as modified by the War Department's orders aforesaid cause any damage whatsoever to the health, welfare, safety, or property of the State of Connecticut or the citizens thereof."

3. By striking out so much of paragraph fifth of the answer as begins with the words "Inasmuch as," in the ninth line on page thirty of the answer, and as ends with the words "has no jurisdiction," in the twenty-first line on page thirty of the answer, and inserting in place thereof the following:

"Inasmuch as the duty of protecting the navigability of navigable waters of the United States and

the regulation of obstructions and diminutions of the navigable capacity of such waters has been committed, consistently with the provisions of the Constitution of the United States, by the Congress of the United States in large part to the Secretary of War, the Chief of Engineers, and the War Department, and in view of the determinations and findings of the Chief of Engineers, with the approval of the Secretary of War, as hereinbefore set forth and as more fully set out in said findings in Appendices 'B' and 'C', hereunto annexed and made a part hereof, within the limits provided in said findings, the issue of the effect of the proposed diversions upon the navigability of the Connecticut river is not open in these proceedings, in the absence of proof that the Commonwealth of Massachusetts has diverted or actually proposes to divert more water than it is permitted to divert by the terms of the orders of the War Department. The defendant, however, avers that neither the diversions authorized by the Massachusetts legislation, annexed hereunto and made a part hereof and marked 'Appendix A', nor the said diversions as modified in accordance with the terms of the permission contained in the War Department's orders, annexed hereunto and made a part hereof and marked 'Appendix B' and 'Appendix C', will in any way unreasonably alter or modify the navigable capacity of the navigable portion of the Connecticut river; nor will the said diversions either as authorized by the Massachusetts legislation or as modified by the War Department's orders aforesaid cause any damage what-

soever to the health, welfare, safety, or property of the State of Connecticut or the citizens thereof."

THE COMMONWEALTH OF MASSACHUSETTS,

By JOSEPH E. WARNER,
Attorney General
Of the Commonwealth of Massachusetts.

BENTLEY W. WARREN,
Special Assistant Attorney General
Of the Commonwealth of Massachusetts.

GERALD J. CALLAHAN,
Assistant Attorney General
Of the Commonwealth of Massachusetts.

R. AMMI CUTTER,
Assistant Attorney General
Of the Commonwealth of Massachusetts.

APPENDIX B

NOVEMBER 30, 1927.

WARE RIVER DIVERSION

War Department, United States Engineer Office, 13th Floor, Custom House, Boston, Mass.

GENTLEMEN: — The letter from your department, signed by S. A. Cheney, Colonel, Corps of Engineers, District Engineer, dated November 22, 1927, directed to this Commission in reference to the contemplated diversion of the waters of the Swift and Ware Rivers for the purpose of procuring an additional water supply for the Metropolitan District received.

The diversion of waters referred to is of the Ware River authorized by Chapter 375 of the Acts of 1926 (Massachusetts) and of the Swift River authorized by Chapter 321 of the Acts of 1927 (Massachusetts), both rivers being entirely within the State of Massachusetts and being non-navigable. Copies of both of these Acts are attached hereto.

In accordance with the letter from your department and as suggested by Colonel Cheney in a recent conference, this Commission hereby makes formal application for a permit for the diversion of the waters of the Ware River in accordance with the terms of Chapter 375 of the Acts of 1926 which provides so far as said diversion is concerned as follows:

> SECTION 1, Paragraph 2 — "The commission, on behalf of the commonwealth, shall forthwith for the purpose of extending and increasing the water supply of the metropolitan water system, and of such cities and towns not members of the metropolitan water district as may hereafter require water from said system, divert into the Wachusett reservoir of said district the flood waters, as defined in section four, of the Ware river at a point in the town of Oakham or the

town of Barre not more than one mile from the bridge of the Boston and Albany railroad crossing said river in the village of Coldbrook, and construct as a part of the metropolitan water system, such works as may be necessary for such extension and increase, and all structures and appurtenances incidental or complementary thereto; provided, that said flood waters shall not be so diverted between May thirty-first and December first in any year unless such diversion be first approved by the state department of public health."

SECTION 4, Paragraph 1 — "For the purposes of this act, the flood waters of the said Ware river which the commission is authorized to divert as provided in section one are hereby defined to be the waters thereof at and above the point of diversion established under section one in excess of a flow of eighty-five million gallons a day, meaning thereby that on any day when the natural flow of said river is less than eighty-five million gallons no water shall be diverted."

This matter was taken up by Mr. Winsor, Chief Engineer of this Commission, with Major Fowler of the Providence office early in the year, and it was our impression that if anything further was required on the part of the War Department, we would be notified. Work has been going on since that time and in view of the immediate necessity of the Boston Metropolitan District for an additional water supply, and the serious danger of a water shortage unless this work is prosecuted to the earliest possible completion, we cannot too strongly urge that a permit be immediately granted.

Respectfully,

METROPOLITAN DISTRICT WATER
SUPPLY COMMISSION,

By (Sgd) DAVIS B. KENISTON,
Chairman.

Incls:
DBK : CH

COPY

7510 (Mass. Metro. Dist. Water Comm.) 1. Subject: Application for permission to divert water from Ware River, Mass.

6TH IND.

Office, C. of E. March 6, 1928. — To the Secretary of War.

1. The Metropolitan District Water Supply Commission of the State of Massachusetts has made application for permits to divert excess waters from Ware River and the major part of the flow of the Swift River for an additional water supply for the Boston Metropolitan District. The particular application under consideration in this indorsement refers to the excess waters of the Ware River.

2. Both rivers lie wholly within the State of Massachusetts. They rise in the central part of the State, flow in a southerly direction and uniting with the Quaboag River, form the Chicopee River. The latter flows westward to the Connecticut River.

3. Both applications contemplate the transfer from the Connecticut basin of a portion of the waters naturally tributary thereto, and their diversion through a tunnel to another watershed. In the case of the Swift River it is proposed to construct a storage reservoir and a very large proportional diversion is requested. The application for the Swift River requires further detailed study to arrive at a close determination of its effects on the navigable capacity of the Connecticut. These studies have not progressed sufficiently to enable me to state at this time the amount of allowable diversion or exact conditions under which diversion may be possible without adverse effect on the Connecticut. No storage is proposed in the case of the Ware River and no diversion except when the flow is in excess of 85,000,000 gallons per day (about 131 cubic feet per

second), with the proviso that no water shall be diverted between May 31 and December 1 in any year unless first approved by the State Department of Public Health. The proposed Swift River diversion presents a complicated question. The Ware River application involves no unusual difficulties.

4. The drainage area of the Swift River above the lower end of the reservoir, is about 186 square miles. The drainage area of the Ware above the proposed point of diversion is about 98 square miles. The drainage area of the Connecticut is about 11,000 square miles.

5. Objections to the proposed diversion have been presented both in writing and orally by representatives of the State of Connecticut, the City of Hartford and the Hartford and New York Transportation Company. The Division Engineer has raised the question of the adverse effect on power development at Enfield Rapids, Conn. The State of Connecticut has instituted an action in the Supreme Court of the United States to restrain the taking of any part of the waters of the Ware, Swift and other rivers, basing its contention only incidentally on adverse effects on navigable capacity of the Connecticut.

6. After a study of the Ware River application had been made, the District Engineer of the Providence District held a public hearing at Springfield, on the 9th ultimo to give the States of Massachusetts and Connecticut and all interested parties opportunity to present their views. At the hearing no attempt was made by either side to controvert the finding set forth in the notice of hearing that the navigable depth of the Connecticut will not be affected by diversion between October 15 and June 15 except to the extent of an average of 0.6 of a day per year. . . .

7. The records of discharge of the Ware River for the years 1913–1926 indicate that a volume of flow in excess

of 131 cubic feet per second at the proposed point of diversion did not occur on any day between October 15 and June 15 of those years when the Hartford gauge at 8 a.m. was below 2 feet. The same records indicate that a volume of flow in excess of 131 cubic feet at the proposed point of diversion has occurred only on an average of 0.7 of a day per year when the Hartford gauge at 8 a.m. was below 3 feet. The maximum amount thus capable of diversion occurred on December 15, 1924, when the volume of flow was 170 cubic feet per second and the gauge reading at Hartford was 2.7 feet. The possible amount that could then have been diverted was 39 cubic feet per second. The effect on gauge heights or navigable depths by the diversion of that amount would be imperceptible. These flashy and insignificant occurrences on the Ware are not reflected by the gauge at Hartford as much as are wind and tide effects. . . .

8. . . . In my judgment the use of excess waters from the Ware, as outlined above, will not have any injurious effect on navigation irrespective of any diversion which may be authorized from the Swift. Furthermore a proper regulation of the Swift River by storage of flood waters may be actually beneficial by making possible an increase of flow during dry periods. By careful and economical usage flood stages may be slightly lowered, navigable depth slightly benefited and diversion of reasonable amounts for water supply made feasible.

9. The applicant is very desirous of a decision concerning the Ware River application as soon as possible. So far as the interests committed to this Department are concerned, I see no reason for deferring action in the case. In my opinion the proposed diversion of waters in excess of 85,000,000 gallons per day (131 cubic feet) will have no adverse effect on the navigable capacity of the Connecticut River. In view of the controversy before the Supreme Court, it seems inadvisable

to issue a formal permit for the present but to inform the applicant that no objection will be interposed by the War Department to the diversion of the flood waters exceeding 85,000,000 gallons per day for the period October 15 to June 15, of each year. Approval of this course of action is recommended.

(Signed) EDGAR JADWIN
Major General,
Chief of Engineers.

Approved March 14, 1928

(Signed) DWIGHT F. DAVIS,
Secretary of War.

War Department
United States Engineer Office
Providence, R. I.

Refer to file No. Comm. 64/1-104 March 19, 1928.

Metropolitan District Water Supply Commission, The Commonwealth of Massachusetts, 24 School Street, Boston, Massachusetts.

Gentlemen: — Referring to your application of November 30, 1927, for federal authority for the diversion of the flood waters of the Ware River for an additional water supply for the Boston Metropolitan District, this office has been directed by the Chief of Engineers to inform you that no objection will be interposed by the War Department to the diversion of the flood waters of the Ware River exceeding 85,000,000 gallons per day for the period October 16 to June 15 each year.

For and in the absence of Colonel S. A. Cheney, Corps of Engineers, District Engineer.

Very respectfully,

THOS. R. McELROE (Sgd.)
Chief Clerk.

APPENDIX C

November 30, 1927.

SWIFT RIVER DIVERSION

War Department, United States Engineer Office, 13th Floor, Custom House, Boston, Massachusetts.

Gentlemen: — The letter from your department signed by S. A. Cheney, Colonel, Corps of Engineers, District Engineer, dated November 22, 1927, directed to this Commission in reference to the contemplated diversion of the waters of the Swift and Ware Rivers for the purpose of procuring an additional water supply for the Metropolitan District received.

The diversion of waters referred to is of the Ware River authorized by Chapter 375 of the Acts of 1926 (Massachusetts) and of the Swift River authorized by Chapter 321 of the Acts of 1927 (Massachusetts), both rivers being entirely within the State of Massachusetts and being non-navigable. Copies of both of these Acts are attached hereto.

In accordance with the letter from your department and as suggested by Colonel Cheney in a recent conference, this Commission hereby makes formal application for a permit for the diversion of the waters of the Swift River in accordance with the terms of Chapter 321 of the Acts of 1927 which provides so far as said diversion is concerned as follows:

> Section 1, 1st Paragraph — "The metropolitan district water supply commission, established by chapter three hundred and seventy-five of the acts of nineteen hundred and twenty-six, hereinafter referred to as the commission, on behalf of the commonwealth, shall forthwith, for the purpose of adding to, extending and further developing the additional

sources of water supply of the metropolitan water system provided for in said chapter three hundred and seventy-five, divert into the Wachusett reservoir of the metropolitan water system the waters of the Swift River, and of Beaver brook, a tributary of the Ware river, by the construction of an extension, to the Swift river, of the aqueduct or tunnel between the Wachusett reservoir and the Ware river at or near Coldbrook provided for in said chapter three hundred and seventy-five, and by the construction of a temporary diversion dam as may be required at a point on the Swift river below the confluence of the east and middle branches or at a point on the east branch near the village of Greenwich, and ultimately by the construction of a dam across the Swift river at or near the boundary line between the towns of Ware and Enfield, and of a dam across Beaver Brook at or near said boundary line, thereby creating a storage reservoir in the Swift river valley. No water shall be diverted or stored in any calendar day when the flow of the Swift river at or just above the village of Bondsville in the towns of Palmer and Belchertown is less than twenty million gallons; and there shall be discharged from any storage created by the commission above said village a sufficient amount of water to maintain, so far as such storage will allow, a flow of said river at said village of not less than twenty million gallons in each calendar day."

This matter was taken up by Mr. Winsor, Chief Engineer of this Commission, with Major Fowler of the Providence office early in the year, and it was our impression that if anything further was required on the part of the War Department, we would be notified. Work has been going on since that time and in view of the immediate necessity of the Boston Metropolitan District for an additional water supply, and the serious

danger of a water shortage unless this work is prosecuted to the earliest possible completion, we cannot too strongly urge that a permit be immediately granted.

Respectfully,

METROPOLITAN DISTRICT WATER
SUPPLY COMMISSION,

By (sgd) DAVIS B. KENISTON,
Chairman.

Encls.
DKB: CH (Pw)

NOVEMBER 30, 1927.

WARE AND SWIFT RIVER DIVERSIONS.

War Department, United States Engineer Office, 13th Floor, Custom House, Boston, Massachusetts.

GENTLEMEN: — Supplementing the applications of November 30 from this Commission to the War Department for permits for the Swift and Ware River diversions, your attention is directed to the correspondence now in your files between Major R. F. Fowler, Corps of Engineers, District Engineer at Providence, and Frank E. Winsor, Chief Engineer of this Commission, covering the period from January 25 to March 9, 1927. This Commission inferred from this correspondence that the War department had taken or would take the view that the proposed diversion from the Ware River would be no detriment to the navigable depth of the Connecticut River and that the proposed diversion from the Swift River would not be objected to unless or until the War Department, after taking into account various other factors influencing the flow of the Connecticut, such as storage held and released by mills, power companies, etc. in ponds and storage reservoirs, should demonstrate that such diversion would reduce the navigable depth, in which case the War Department might require greater quantities to be released from time to time during the dry season.

The diversion of both the Swift and Ware Rivers is essentially one project so far as a practical and economical development of an additional water supply for the Boston Metropolitan District is concerned.

The Ware River diversion in effect skims off the flow as it occurs in excess of 85,000,000 gallons, which is equivalent to 1.34 cubic feet per second per square mile from the approximate 98 square miles of drainage area affected (prior to a recent survey this area was assumed

to be about 100 square miles). This flow of 1.34 cubic feet per second unaffected by the diversion is several times the average dry weather flow of the Ware River.

The Swift River diversion is from about 186 square miles and there is guaranteed a flow in the Swift River at Bondsville, about five miles below the proposed Swift River Reservoir, of 20,000,000 gallons a day, the drainage area at Bondsville being about 195 square miles. The guaranteed flow is 0.16 cubic feet per second per square mile. The drainage area of 186 square miles is 1.71% of the drainage area of the Connecticut River of 11,400 square miles and from this 186 square miles sufficient water is released to insure a flow of 0.16 cubic feet per second per square mile from 195 square miles of drainage area. There will be no reduction but a slight increase in the flow of the Swift River in the driest times and during the usual dry season the average reduction in flow of the Connecticut River will correspond to a reduction of drainage area of that river not greater than one per cent. The effect on the flow of the Connecticut River of so small a diversion will, it is believed, be immeasurable so far as reducing the navigable depth is concerned.

During the past year the Commission has expended a large amount of money on the Ware and Swift River projects, including the cost of sinking of shafts preparatory to the construction of the tunnel which is necessary for making available the flood waters of the Ware River. Satisfactory bids for the construction of the tunnel itself were received on November 18. This contract if awarded in the immediate future and if completed in the time specified will permit the diversion of Ware River water into the Wachusett Reservoir in the winter or spring of 1931, before which time no water can be diverted. To suspend operations at this time would not only involve the Commonwealth in a heavy financial loss, but would also delay procuring the additional supply of water badly needed by the Metropolitan District at the earliest possible date.

The Swift River diversion cannot be begun until the tunnel is extended from the Ware River to the Swift River and it is estimated that the earliest time at which water could be diverted from the Swift River would be during 1933.

There is inclosed herewith preliminary blueprint of plan, Accession 617, being a general plan of the Metropolitan Water Supply.

Respectfully,

METROPOLITAN DISTRICT WATER
SUPPLY COMMISSION,

By (Sgd) DAVIS B. KENISTON,
Chairman.

FEW : AW
Inclosure

COPY

7510 (Mass. Metro. Dist. Water Supply Com.) 2. Subject: Swift River Diversion.

7TH IND.

Office, C. of E., May 9, 1929. — To the Secretary of War.

1. On November 30, 1927, the Metropolitan District Water Supply Commission of Boston, at the written suggestion of the District Engineer, Providence District, made a formal application for a permit to divert water from the Swift River, Massachusetts, in accordance with the terms of Chapter 321 of the Acts of 1923 of that State. On the same date, the Commission also made application for a permit to divert water from the Ware River, Massachusetts, in accordance with the terms of Chapter 375 of the State Acts of 1926.

2. Those rivers rise in the central region of Massachusetts and flow southerly and westerly to a junction forming the Chicopee River which flows westerly and empties into the Connecticut at a point about 9.5 miles north of the boundary between Massachusetts and Connecticut.

3. On March 14, 1928, the Secretary of War approved a recommendation of the Chief of Engineers that the applicant be informed that no objection would be interposed by the War Department to the diversion from the Ware River of the flood waters exceeding 85,000,000 gallons per day for the period October 15 to June 15, of each year. This approval was given by the Secretary of War with the understanding that such action would not affect the consideration of the Swift River application.

4. The Swift River application contemplates the storage of its flow and its possible diversion with the exception of 20,000,000 gallons of water per day into the Wachusett Reservoir, situated about 30 miles eastward

of the point of diversion and in another watershed. Storage would be provided first by a temporary dam to be constructed below the confluence of the east and middle branches of the Swift River or at a point on the east branch near the village of Greenwich, and ultimately by the construction of a dam across the Swift River at or near the boundary of Ware and Enfield, and of a dam across Beaver Brook at or near said boundary line.

5. No permit is required for any of the diversion structures as the Swift River and its various branches, as well as Beaver Brook, are non-navigable streams. The jurisdiction of the War Department in cases of this kind begins when the appropriation or regulation of the waters of a non-navigable tributary is of such extent as "to alter or modify the . . . condition or capacity of . . . the channel of any navigable water of the United States". Since such alteration or modification without previous recommendation and authorization of the Chief of Engineers and the Secretary of War is unlawful, the War Department is interested in determining whether the amount of such appropriation or regulation would probably demand institution of Federal proceedings to preserve substantially the navigability of navigable waters.

6. This particular case has been studied in great detail during the past 17 months by the District Engineer at Providence, the Division Engineer at New York and the Office of the Chief of Engineers. Full opportunity has been given to the representatives of the Metropolitan District Water Supply Commission and of the State of Connecticut and other interested parties, to present data and to inform themselves of the progress of these studies.

7. The State of Connecticut presented objections based on both legal and engineering grounds. All such legal questions have been answered so far as concerns the interests entrusted to the Department. No attempt has been made to answer the fundamental questions of

law involved as to the right to divert water from one watershed to another, inasmuch as the State of Connecticut has instituted an action in the Supreme Court of the United States to restrain the taking of any part of the water of the Ware, Swift and other rivers. It is believed that the decision of such issues should be left to that tribunal. The objections which have been raised on engineering or navigation grounds are referred to later in this indorsement.

8. The watershed of the Connecticut River above the Massachusetts-Connecticut boundary is 9,915 square miles. The drainage area of the Swift River involved in this application is approximately 186 square miles. The mean annual discharge of the Connecticut River at the State Line is about 17,000 cubic feet per second and the mean annual discharge of the Swift River at the proposed dam site, about 300 cubic feet per second. The discharges of both rivers are affected and regulated to a considerable extent by mill and power dams which temporarily store water to suit occupational uses. The stage of the river at Hartford is indicated by a gauge at that point. The surface elevations are affected by tide and wind. The best information of normal flow conditions of the Connecticut River is afforded by the records of the United States Geological Survey gauge at Sunderland, Massachusetts, located on that river about as far above Hartford as the site of the proposed dam on the Swift River. Study of the gauge records indicate that critical stages normally occur between June 15 and November 15. The critical period for navigation is taken as from June 1 to November 30.

9. The legislation of the State of Massachusetts prescribes that there shall be maintained a minimum flow of water of 31 cubic feet per second at Bondsville at a gauge located on the Swift River below the site of the proposed impounding dam, and where the tributary drainage area is 8 square miles in excess of that above that dam.

10. The results of the studies made by and under the direction of this office were submitted for comment to the representatives of the Metropolitan Water Supply District of Boston and to the representatives of the State of Connecticut. Both groups were in this office many times in discussions and conferences on both the legal phases and the navigation features of the case. In general, the representatives of Massachusetts indicated originally the opinion that the Office of the Chief of Engineers was magnifying the effect on navigation of the proposed appropriation of water in excess of 31 cubic feet per second. They stressed the desirability of early action by the Department to define the limits beyond which Massachusetts could not appropriate water without violating the provisions of the River and Harbor Act of March 3, 1899. On the other hand, the representatives of the State of Connecticut claimed that the proposals of the Department would not assure a 2-foot stage on the Hartford gauge; furthermore, that the maintenance of a 3-foot gauge rather than a 2-foot gauge was a better measure of the navigable capacity of the Connecticut River. Principally, however, the representatives of Connecticut strongly urged against any action positive or negative or inferential which permitted or which would permit or acquiesce to any degree in any diversion from the watershed of the Connecticut River to any other watershed.

11. The applicant is very desirous of obtaining a definite statement as to the limits of appropriation of water from the non-navigable Swift River which may be possible without substantially altering the condition or capacity or the channel of the navigable Connecticut River. In addition to the exhaustive study of the engineering data pertinent to the interests committed to the War Department, this office has taken into consideration the possible bearing upon Department action in this matter of the decisions of the Supreme Court in the cases of the United States *vs.* Rio Grande Dam

Irrigation Company and of the State of Wisconsin and other states *vs.* the State of Illinois and Sanitary District of Chicago, both of which involve questions regarding diversions affecting navigable waters. In the action hereinafter suggested, it is felt that the proposed position of the War Department will in no way prejudice the litigation now pending before the Supreme Court.

It is recommended that the applicant be informed as follows:

(a) It is the duty of the War Department to institute proceedings to preserve the substantial navigability of navigable waters of the United States when the appropriation or regulation of the waters of a non-navigable tributary affects, substantially alters or modifies the condition or capacity of the channel of a navigable water.

(b) The War Department is unwilling to admit that the appropriation of water from the Swift River to the extent proposed in this application might not, on occasion, have an appreciable effect on the navigable capacity of the Connecticut River.

(c) Limited amounts of water may be appropriated from the Connecticut River basin above the Connecticut-Massachusetts State Line, without substantially diminishing the navigability of that stream within the limits of present navigability.

(d) It is found that a discharge of 4,900 cubic feet per second at Sunderland, Massachusetts, corresponds to average lower low tide gauge height of 2.1 at Hartford, Connecticut and that a discharge of 4,650 cubic feet per second at Sunderland corresponds to an average lower low tide gauge height of 2.0 at Hartford.

(e) From the studies of past records it appears there will be no substantial alteration or modification of the condition or navigable capacity of the channel of the navigable portion of the Connecticut River if the flow of water from the Swift River as provided in

the terms of Chapter 321, of the Acts of 1927 (Massachusetts) be augmented during the critical period from June 1 to November 30, both inclusive, so that the measured rate of discharge on the Swift River shall be 70 cubic feet per second on such days as the United States Geological Survey gauge at Sunderland, Massachusetts indicates the discharge of the Connecticut River at that point to be less than 4900 cubic feet per second and more than 4650 cubic feet per second and shall be further augmented so that the measured rate of discharge past the impounding dam on the Swift River shall be 110 cubic feet per second on such days as the Geological Survey gauge at Sunderland Massachusetts indicates the discharge on the Connecticut River at that point to be 4650 cubic feet per second or less.

(f) The rates of discharge set forth in subparagraph (e) are subject to review based on more complete data which may become available in the future.

12. Approval of this course of action is recommended.

[M. & R. DIV. (s) EDGAR JADWIN
May 10, 1929
Off. Sec. War]

EDGAR JADWIN,
Major General,
Chief of Engineers.

1 Inclo. viz;
Map showing proposed
plan of diversion.

Recommendation of 7th indorsement approved May 11, 1929.

[M & R Div. (s) JAMES W. GOOD,
May 11, 1929 *Secretary of War.*
Off. Sec. War[

Sub. 2/6 accpg.

MAY 11, 1929.

COPY

Address Reply to
THE DISTRICT ENGINEER
Room 419, New Federal Building
Providence, R. I.

WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
Providence, R. I.

MAY 17, 1929.

Refer to File No. Conn. 54/1-166

Metropolitan District Water Supply Commission, 24 School Street, Boston, Mass.

GENTLEMEN: — With reference to your application of November 30, 1927 for a permit to divert water from the Swift River, Massachusetts, in accordance with the terms of Chapter 321 of the Acts of 1923 of that State, I have been directed by the Chief of Engineers under date of May 13 to inform you as follows:

(a) It is the duty of the War Department to institute proceedings to preserve the substantial navigability of navigable waters of the United States when the appropriation or regulation of the waters of a non-navigable tributary affects, substantially alters or modifies the condition or capacity of the channel of a navigable water.

(b) The War Department is unwilling to admit that the appropriation of water from the Swift River to the extent proposed in this application might not, on occasion, have an appreciable effect on the navigable capacity of the Connecticut River.

(c) Limited amounts of water may be appropriated from the Connecticut River basin above the Connecticut-Massachusetts State Line, without substantially diminishing the navigability of that stream within the limits of present navigability.

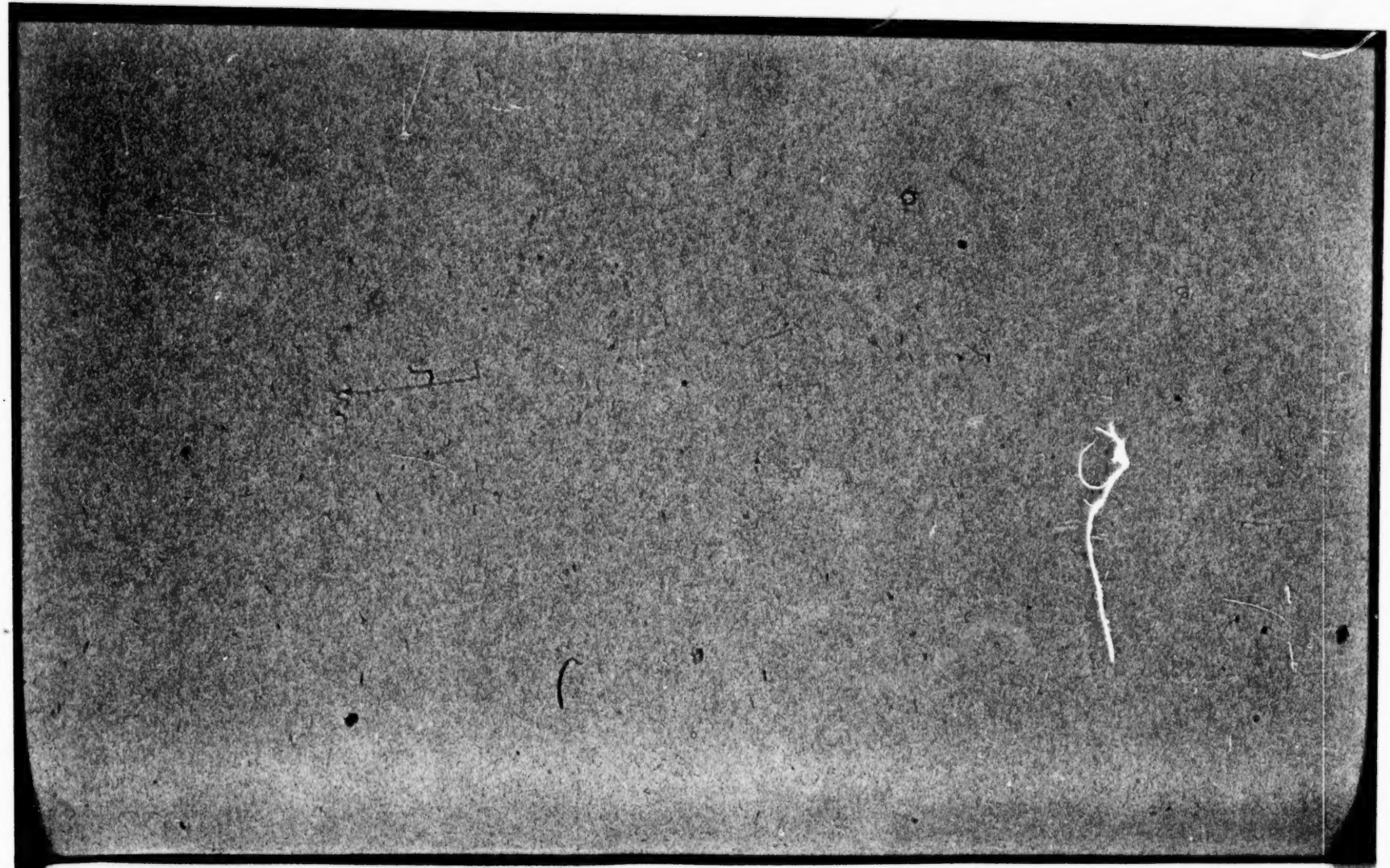
(d) It is found that a discharge of 4900 cubic feet per second at Sunderland, Massachusetts, corresponds to average lower low tide gauge height of 2.1 at Hartford, Connecticut and that a discharge of 4650 cubic feet per second at Sunderland corresponds to an average lower low tide gauge height of 2.0 at Hartford.

(e) From the studies of past records it appears there will be no substantial alteration or modification of the condition or navigable capacity of the channel of the navigable portion of the Connecticut River if the flow of water from the Swift River as provided in the terms of Chapter 321, of the Acts of 1927 (Massachusetts) be augmented during the critical period from June 1 to November 30, both inclusive, so that the measured rate of discharge on the Swift River shall be 70 cubic feet per second on such days as the United States Geological Survey gauge at Sunderland, Massachusetts indicates the discharge of the Connecticut River at that point to be less than 4900 cubic feet per second and more than 4650 cubic feet per second and shall be further augmented so that the measured rate of discharge past the impounding dam on the Swift River shall be 110 cubic feet per second on such days as the Geological Survey gauge at Sunderland, Massachusetts indicates the discharge on the Connecticut River at that point to be 4650 cubic feet per second or less.

(f) The rates of discharge set forth in subparagraph (e) are subject to review based on more complete data which may become available in the future.

Very respectfully,

(Signed) F. S. SKINNER
Major, Corps of Engineers,
District Engineer.



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CHARLES ELMORE CR
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In the
Supreme Court of the United States.

OCTOBER TERM, 1929.

ORIGINAL NO. ~~13~~. 12

IN EQUITY.

THE STATE OF CONNECTICUT

v.

THE COMMONWEALTH OF MASSACHUSETTS.

REPRINT OF ANSWER OF DEFENDANT

THE COMMONWEALTH OF MASSACHUSETTS, INCLUDING AMENDMENTS ALLOWED DECEMBER 2, 1929.

JOSEPH E. WARNER, *Attorney General*
Of the Commonwealth of Massachusetts,

BENTLEY W. WARREN,
Special Assistant Attorney General
Of the Commonwealth of Massachusetts,

GERALD J. CALLAHAN,
R. AMMI CUTTER,
Assistant Attorneys General
Of the Commonwealth of Massachusetts,
Attorneys for the Defendant.

In the
Supreme Court of the United States.

OCTOBER TERM, 1929.

ORIGINAL NO. 13.

IN EQUITY.

STATE OF CONNECTICUT

v.

THE COMMONWEALTH OF MASSACHUSETTS.

MOTION FOR LEAVE TO FILE REPRINT OF ANSWER.

And now comes the defendant in the above-entitled case and moves for leave to file a reprint of the answer heretofore filed by leave of court on March 5, 1928, revised so as to include the amendments allowed by leave of court on December 2, 1929. The said amendments have been consolidated with the material in the original answer and certain minor errata have been corrected.*

JOSEPH E. WARNER,
Attorney General
of the Commonwealth of Massachusetts.

BENTLEY W. WARREN,
Special Assistant Attorney General
of the Commonwealth of Massachusetts.

GERALD J. CALLAHAN,
R. AMMI CUTTER,
Assistant Attorneys General
of the Commonwealth of Massachusetts.

* These corrections involve merely the headings of the letters in Appendices "B" and "C", appearing, *infra*, pp. 81, 89, 92.

In the
Supreme Court of the United States.

OCTOBER TERM, 1929.*

No. 13. ORIGINAL. IN EQUITY.

THE STATE OF CONNECTICUT,
Complainant,

v.

THE COMMONWEALTH OF MASSACHUSETTS,
Defendant.

ANSWER TO THE BILL OF COMPLAINT.†

And now comes the Commonwealth of Massachusetts by Joseph E. Warner, its Attorney General,‡ and for answer to the bill of complaint heretofore filed by leave of court by the State of Connecticut says as follows:

1. The defendant admits the material allegations of fact, if any such there be, contained in the first paragraph of the bill of complaint, set forth on page one of the printed bill.

2. Answering the second paragraph, set forth on page two of the printed bill of complaint, the defendant admits that the State of Connecticut was one of the "Thirteen Original Colonies" and that said State was a party to the original adoption of the Constitution of the United States; that said State, through its duly constituted authorities, has exercised sovereign power under said Constitution over such lands, waters, and other prop-

* October term 1927, No. 14.
† Original answer filed by leave of court on March 5, 1928.
‡ Succeeding Arthur K. Reading, resigned June 6, 1928.

erties as are now comprised within the territorial limits of the State of Connecticut since the adoption of such Constitution, but the defendant says that such sovereign power of the State of Connecticut is subject to the superior power of the Government of the United States in so far as regulatory power is given to the Government of the United States under the Constitution of the United States. As to whether or not said State has succeeded to all the rights, properties, duties, and obligations created by charter granted in 1662 by King Charles the Second, King of Great Britain, the defendant is ignorant and says that if the allegations to that effect are material allegations of fact it can neither affirm nor deny the same, but leaves the complainant to prove the same if and in so far as they may be material. The defendant denies that a great portion of the Connecticut River is included within the territorial limits of the State of Connecticut and that all of the portion of said river actually so included is navigable.

3. Answering the third paragraph set forth on pages two and three, of the printed bill of complaint, the defendant admits that it was one of the original Colonies and was a party to the Constitution of the United States; that at the time of the adoption of said Constitution the said defendant was a body politic organized for the usual governmental purposes and exercising sovereignty over the territory within its then defined limits, which included a portion of the Connecticut River and a portion of many of the tributaries of said river, including those specifically set out in said third paragraph of the bill of complaint. The defendant denies that the Swift River, the Ware River, and the Quaboag River flow directly into the Connecticut River, but avers that the Swift River flows into the Ware River about seven-tenths (7/10) of a mile above the village of Three Rivers in the town of Palmer, at which village the Quaboag

flows into the joint waters of the Ware and Swift rivers, forming as a result of said confluence a river known as the Chicopee River, which flows in a general westerly direction about seventeen miles emptying then directly into the Connecticut River. The defendant denies that the waters of all or any of said tributaries are necessary to maintain and preserve the flow of said Connecticut River.

4. Answering the fourth paragraph, set forth on page three, of the printed bill of complaint, the defendant denies each and every material allegation of fact therein contained, if any such there be, except that the defendant admits that the Commonwealth of Massachusetts has exclusive control and power of regulation of all water within its territorial limits and that such sovereignty over the waters within the territorial limits of the said State of Connecticut and of the Commonwealth of Massachusetts as may be exercised by the respective State and Commonwealth is subject to such rights as have been conferred upon the United States of America by the Constitution of the United States in the interests of interstate commerce and for the protection of the navigability of streams, wherever the same may be situated. The defendant further says that if the law of the State of Connecticut with respect to the control and power of regulation of the waters within the territorial limits of said State is here material, the defendant is ignorant of the same and leaves the complainant to prove the same in so far as it may be material. And further answering the defendant says that by the law both of the Commonwealth of Massachusetts and of the State of Connecticut owners of riparian lands are entitled to make reasonable and equitable use of the waters of streams flowing by or through their lands providing that such use is not inconsistent with a similar reasonable and equitable use of the said stream by lower riparian owners.

necessarily be incurred by the said referees, shall if approved by the said court be paid by the commission. The board shall determine its procedure including all matters relating to the form and place of application subject to the approval of said court. Upon reference of any claim within the provisions of this section, and after notice to the parties and hearing thereon, the board shall determine the amount of damages suffered and shall certify its findings to the commission; which findings shall be conclusive upon all parties except that any party in interest aggrieved by a ruling of the referees on a question of law may object thereto and the supreme judicial court shall have power to review and modify any finding to the extent that it may be an error in that respect, but not otherwise. If any person or corporation has a claim for damage under this section and also a claim for damages to property or rights in property within the provisions of section four of this act, the referees to whom said first named claim is referred under the provisions of this section shall, upon written application by the claimant, with the assent of the commission, have jurisdiction to determine both said claims.

Any person or corporation presenting a claim under this section for decrease in value of any parcel of land or of a business shall have no further claim under this section for damages to such land or business and all existing claims whether for damages to land, business or employment shall be included in one statement.

No right to recover damages or to receive any payment under this section shall be assignable, but any such right shall survive to the heirs at law of the party entitled.

SECTION 6. Prior to the taking under section four of this act of any land or rights in land within the territory described in the first paragraph of section five of this act which will be required for the reservoir or the protection

of the waters thereof, the owner of any such land or rights in land may at any time after November first, nineteen hundred and twenty-eight, if he so elects, file with the commission a sworn statement of the location, nature and extent of such land or rights together with such further information as the commission may require, the sum he is willing to accept therefor and a request that such land or rights be acquired. If in the opinion of the commission such land or rights are within the said territory and will be required, it shall with all due diligence make a search of the title and if it deems it necessary a survey, and shall furnish said owner with a statement of any defects in the title. As soon thereafter as the owner delivers to the commission a deed and all other instruments necessary to convey to the commonwealth a merchantable title to such land or rights and files a sworn copy of said statement with the board of referees, as provided in section five of this act, he shall have a claim for damages for the value of such land or rights, which value said board shall determine, as provided in said section five, unless a settlement has been previously effected by agreement. The said board shall certify its findings to the commission and the owner, which said findings shall be conclusive upon all parties except as otherwise provided in said section five.

In determining the value of any land acquired under this section within the territory described in the first paragraph of section five of this act, or the damage to any business as provided in the first paragraph of said section five, said board of referees may include in such value of land or damage to business such depreciation of value of land or decrease in value of business, if any, in addition to any damages which would otherwise accrue, as in the opinion of the said board may have been caused between January first, nineteen hundred and twenty-six, and the date of the passage of this act by reason of proposed legislation resulting in this act.

The board of referees may consider as an element of damage, in determining the value of any land used for farming purposes acquired under this section and owned at the date of the passage of this act by a person whose principal business is farming and who is no longer to continue that occupation in that neighborhood, any difference between the fair value of tools and implements used by him for farming purposes and the value thereof at a forced sale.

SECTION 7. The commission may either before a taking or afterward make such settlements as it may deem for the best interests of the commonwealth with any person or corporation having a valid claim under this act.

SECTION 8. If any public ways are within the area taken in fee by the commission, such portions thereof as the commission shall determine shall, at such time after such taking as the commission shall so notify the public authorities charged with their continuance and maintenance, be discontinued. The commission shall provide, when reasonably practicable, and public necessity or convenience require, other suitable ways in lieu of those discontinued, and may acquire by purchase or otherwise as provided by this act any lands or rights in land needed therefor. The practicability, public necessity and convenience and the location and character of any such new ways shall be determined by agreement between the commission and the county commissioners of the county or counties in which any discontinued way is situated, or, if they are unable to agree, by the department of public works.

The commission shall cause such public ways as it shall establish or alter under the provisions of this section to be constructed and graded so that they shall be reasonably safe and convenient for travel, and shall upon the completion of such ways give written notice

to the selectmen of the town in which each such way or portion thereof is located that such way is open for travel, and thereafter such ways or parts thereof shall be maintained and kept in repair by the towns in which they are located. If however the total highway mileage other than state highways within such portion of any town as is not taken or acquired in fee under the second paragraph of section four of this act shall because of the relocations caused by the carrying out of this act exceed the mileage in such portion of said town at the time of the passage of this act, said commission shall pay to such town any amount which the governor and council shall deem proper for the added burden for the future care and maintenance of such additional highway mileage.

Any public ways or portions thereof within the area taken in fee by the commission shall, until such time as they may be discontinued as provided in this section, continue to be maintained as highways with the same rights and duties of counties, towns and other parties as before such taking, except that such public ways in the towns of Enfield, Greenwich and Prescott shall, after the annexation of said towns, as hereinafter provided, be maintained by the commission to the extent and in the manner provided in section seventeen of this act.

SECTION 9. If any burial ground, cemetery, grave or place of human burial is within the area taken in fee by the commission, or is located so near to the reservoir or other waterway as to be liable to pollute or reduce the quality or value of any such waters as a potable water supply, the commission shall remove the remains found in any such burial places. The commission may agree with the next of kin, or other persons having the right to represent or dispose of such remains, as to the place or places to and in which such remains shall be removed and reinterred, and in such case the commission may pay

the reasonable cost of a burial lot and shall pay the expenses reasonably necessary for such removal, including the removal and resetting of the gravestones, monuments and markers of such graves. In any case where such next of kin or other persons are unknown or unascertainable, or where there is no such agreement, the commission shall furnish a place or places for such reburials, and may establish a general burial ground or grounds therefor, and subject to the provisions of section thirty-five of chapter one hundred fourteen of the General Laws, may acquire by purchase or otherwise as provided by this act any lands needed therefor. Any such general burial ground or grounds shall upon their completion be transferred to such trustees, persons, municipalities or public officers as may be agreed upon by the parties at interest, and in case no such agreement is made, then to the body corporate or to the public officials charged with the care of cemeteries in the town in which such burial ground is located, and any such agreement or transfer shall include the transfer of any trust funds established for the benefit or care of the cemetery or lots therein which contained remains thus removed to such general burial ground and upon any such transfer of a general burial ground, the commission shall pay to the body corporate or public officials to whom such transfer is made such additional sum as the governor and council shall deem to be requisite and reasonable for the care, maintenance and preservation of such burial ground.

Such removal of bodies shall be made without undue delay upon the request of the descendants or relatives of such deceased persons or of such persons as appear to the commission to be entitled to ask for such removal. Before any existing burial ground is submerged, all bodies, tombs and monuments shall be removed. After a suitable burial ground has been provided by the com-

mission no burial shall be made in any burial ground which will be flowed or affected by the carrying out of this act, but the bodies of any persons which would otherwise be entitled to burial in such burial ground may be buried in such lot in the new burial ground as may be provided by the commission. To whatever cemetery a body may be removed, if the lot from which the body has been taken was under perpetual care, then the additional cost, if any, for perpetual care in the place of removal to an amount not exceeding one hundred dollars shall be provided by the commission for the lot to which removal has been made.

The commission in carrying out the provisions of this section shall conform to any reasonable requirements of the board of health of the town in which any burial ground so flowed or otherwise affected is situated.

SECTION 10. The commission may alter, relocate or discontinue the whole or any parts of any rights of way belonging to any railroad corporation or electric transmission company and in case of such alteration or relocation may construct upon existing or other locations parts of the railroad or transmission line to take the place of the parts so discontinued, or the railroad or transmission line, any part of which is taken, may in whole or in part be discontinued or abandoned as and in such manner as shall be mutually agreed upon by the commission and the board of directors of the railroad corporation or electric transmission company subject to such approval as is required by law of any state or federal authorities, and if the commission and such companies cannot agree thereon, then as and in such manner as shall be determined, on the application in writing of either party, by the department of public utilities, which is hereby authorized and directed to adjudicate finally upon all questions relative thereto, subject to such approval of any federal authorities as is

required by law. If the commission shall be of the opinion that any such alteration or construction requires that lands or rights therein be taken therefor, the commission may take or acquire by purchase or otherwise, as provided by this act, such lands or rights therein and may convey the same to the railroad corporation or electric transmission company to be thereafter held and used as the property of such corporation or company for railroad or transmission line purposes, and such railroad corporation or electric transmission company may file a description of said relocation with the county commissioners and may maintain and operate said relocated lines of railroad or transmission lines with the same powers, rights and duties as in the case of the original lines.

The provisions of section five of this act shall not apply to railroad corporations or to electric transmission companies engaged in supplying electricity in bulk, as such term is defined in section one of chapter one hundred and sixty-four of the General Laws, or to other public utilities directly engaged in interstate commerce.

In any claim by any railroad corporation or electric transmission company for damages arising from the carrying out of this act, the relocation of the railroad or electric transmission line right of way of such corporation or company may be shown in mitigation of damages.

SECTION 11. In carrying out the powers and duties conferred upon it by this act the commission may construct and maintain dams, buildings, machinery, roads, conduits and aqueducts, may lay and maintain pipes, drains and wires, may alter or change the grade or direction of any water course, may carry and conduct any aqueduct, conduit, pipe, drain, or wire under or over any water course or any railroad, street or other way in such a manner as not unnecessarily to obstruct or

impede travel thereon, may dig up any such road, street or way and lay, maintain and repair aqueducts, conduits, pipes, wires and other works, beneath the surface thereof, conforming to any reasonable regulations made by the mayor and aldermen of cities and the selectmen of towns, respectively, wherein such works are performed and restoring, so far as practicable, any such road, street, or way to as good order and condition as the same was in when such digging was commenced; may make such surveys and borings and do such other preliminary work on private lands as it may determine to be necessary or desirable, doing as little damage as possible and paying for the same; may enter upon and use land owned by others and, so far as practicable, shall heed all reasonable requests made by such owners; and in general may do any other act or thing necessary or proper for carrying out the powers and duties conferred upon it by this act.

The commission shall have exclusive right and control during construction and until turned over to the metropolitan district commission or to others as authorized in this act, of all properties, ponds, water sources, cemetery sites and other works of every description purchased or taken by the commission or constructed by it under this act, and may order any or all persons to keep from entry in or upon the same and shall, through their agents, have full power to carry out these provisions with respect thereto, and the courts having jurisdiction shall have full authority for the enforcement of the provisions of this section.

The commission shall provide, or may agree with the local authorities in any town in which work is done under this act to pay for such additional police protection as is made necessary by the doing of such work.

No town within which are included the areas of Enfield, Greenwich or Prescott taken in fee for reservoir purposes

or for reservoir protection shall be required after the completion of the reservoir to bear any costs of or expenses for schools, policing or fire, gypsy moth or other insect pest protection within said reservoir areas described in this paragraph.

SECTION 12. Any town, other than Enfield, Greenwich or Prescott, from which any property which it holds in its private or proprietary capacity is taken under this act or which is otherwise constitutionally entitled to compensation for damage suffered under this act, may recover such damage from the commonwealth, in the manner provided by section four of this act.

SECTION 13. Upon the expiration of thirty days from the recording of an order of taking as provided by section four of this act by which taking, together with previous purchases or takings as provided by said section four, of land in the towns of Enfield, Greenwich and Prescott, the whole or a substantial part of said towns is taken, and after notice thereof to the towns to be affected by annexation as hereinafter described in this section, the territory within the towns of Enfield, Greenwich and Prescott shall be annexed to the adjacent towns, and to the counties in which such adjacent towns are located in the following manner:

(*a*) There shall be annexed to the town of New Salem, and thereby to Franklin county, those portions of the towns of Prescott, Greenwich and Enfield, being portions of Hampshire county, bounded as follows: beginning at the intersection of the boundary lines of the towns of New Salem, Prescott and Shutesbury and following the existing channel of the west branch of the Swift river in a general southerly direction to its confluence with the Swift river; thence following the existing channel of the Swift river and its middle branch in a general northeasterly direction to the point where it is crossed by the boundary line between the towns of

Prescott and Dana; thence following the boundary line between the towns of Prescott and Dana in a general northerly direction to its intersection with the boundary line of the town of New Salem; thence following the boundary line between the towns of New Salem and Prescott in a general westerly direction to the point of beginning.

(*b*) There shall be annexed to the town of Dana, and thereby to Worcester county, those portions of the towns of Prescott and Greenwich, being portions of Hampshire county, bounded as follows: beginning at the point where the middle branch of the Swift river crosses the boundary line between the towns of Dana and Prescott and following the existing channel of said middle branch in a general southerly direction to its confluence with the east branch of said river; thence following the existing channel of said east branch in a general northeasterly direction to the boundary line between the towns of Greenwich and Hardwick; thence following the boundary line between the towns of Greenwich and Hardwick in a general northeasterly direction to its intersection with the boundary line of the town of Dana; thence following the boundary line between the towns of Dana and Greenwich in a general northerly direction to its intersection with the boundary line of the town of Prescott; thence following the boundary line between the towns of Dana and Prescott in a general northerly direction to the point of beginning.

(*c*) There shall be annexed to the town of Hardwick, and thereby to Worcester county, that portion of the town of Greenwich, being a portion of Hampshire county, bounded as follows: beginning at the most westerly corner stone on the boundary line between the towns of Hardwick and Greenwich located about two thirds of a mile southerly from the outlet of East pond; thence running due west to the existing channel of the east

branch of the Swift river; thence following the existing channel of said east branch in a general northeasterly direction to its intersection with the boundary line between the towns of Hardwick and Greenwich; thence following said boundary line between the towns of Hardwick and Greenwich in a general southerly direction to the point of beginning.

(*d*) There shall be annexed to the town of Ware those portions of the towns of Greenwich and Enfield, all of said towns being in Hampshire county, bounded as follows: beginning at the aforesaid most westerly corner stone on the boundary line between the towns of Hardwick and Greenwich located about two thirds of a mile southerly from the outlet of East pond; thence running due west to the existing channel of the east branch of the Swift river; thence following the existing channel of said east branch and of the Swift river in a general southwesterly direction to the intersection of the boundary line of the towns of Ware, Belchertown and Enfield; thence following the boundary line between the towns of Ware and Enfield in a general easterly direction to its intersection with the boundary line of the town of Hardwick; thence following the boundary line between the towns of Hardwick and Enfield in a general northerly direction to its intersection with the boundary line of the town of Greenwich; thence following the boundary line between the towns of Hardwick and Greenwich in a general northerly direction to the point of beginning.

(*e*) There shall be annexed to the town of Belchertown that portion of the town of Enfield, both of said towns being in Hampshire county, bounded as follows: beginning at the intersection of the boundary lines of the towns of Belchertown, Pelham and Enfield; thence running due east to the existing channel of the west branch of the Swift river; thence following the existing channel of said west branch and of the Swift river in a general

southerly direction to the boundary line between the towns of Belchertown and Enfield; thence following the boundary line between the towns of Belchertown and Enfield in a general northwesterly direction to the point of beginning.

(*f*) There shall be annexed to the town of Pelham that portion of the town of Enfield, both of said towns being in Hampshire county, bounded as follows: beginning at the intersection of the boundary lines of the towns of Belchertown, Pelham and Enfield; thence running due east to the existing channel of the west branch of the Swift river; thence following the existing channel of said west branch in a general northerly direction to the intersection of the boundary lines of the towns of Prescott, Pelham and Enfield; thence following the boundary line between the towns of Pelham and Enfield in a westerly and southerly direction to the point of beginning.

SECTION 14. All the property belonging to the towns of Enfield, Greenwich and Prescott shall upon the annexation of said towns to adjacent towns by authority of this act, vest in and become the property of the commonwealth for the benefit of the metropolitan water district, and the commonwealth shall succeed to all the rights, claims and causes of action of each of said towns, and shall assume and be liable for all the debts, obligations, trusts, duties and liabilities of each of said towns. All actions and causes of actions by or against the said towns of Enfield, Greenwich and Prescott pending or accrued, when such annexation takes effect, shall survive, and may be prosecuted to final judgment and execution by or against the commonwealth. All books, papers, monies and other property in the possession of the treasurer of each of these three towns or of any town officer thereof shall be turned over to the commission at the time of said annexation, and the commission shall wind up and liquidate the affairs of each such town as

speedily as possible. Upon the final liquidation of the affairs of the towns of Enfield, Greenwich and Prescott, the commission shall turn over such of the records of said towns respectively as are of permanent value to the towns of Belchertown, Dana and New Salem, respectively, and said records shall be preserved with the records of the town to which they have been so turned over.

Upon such annexation the division of accounts of the department of corporations and taxation shall audit the books and accounts of the collector of taxes of each of the towns of Enfield, Greenwich and Prescott, respectively, and all taxes assessed for the year of such annexation and remaining uncollected, except taxes assessed upon property acquired by the commission under the second paragraph of section four of this act, to persons residing or property located within the territory annexed to another town shall be, by the assessors of the town in which such taxes were assessed, committed to the collector of taxes of the town to which such territory is by the provisions of this act annexed. It shall be the duty of any collector of taxes to whom any such taxes are committed to complete the collection of such taxes with legal interest and costs and pay over the same to the treasurer of the town for which he is the collector.

Upon the annexation to adjacent towns of the territory within the towns of Enfield, Greenwich and Prescott as set forth in this act, the commission or the metropolitan district commission shall yearly in the month of November reimburse each of said adjacent towns for all money paid out or expenses incurred under the laws of the commonwealth for the year preceding in the relief or aid of persons whose settlement was gained in whole or in part whether by original acquisition or derivation within the territory annexed to each of said towns respectively prior to the date of such annexation.

SECTION 15. Annexation under this act shall constitute the annexed territory part of the town and the county to which it is annexed with respect to the jurisdiction of the courts, as well as for all other purposes. All suits, proceedings, complaints and prosecutions, and all matters of probate, which shall be pending at the time of such annexation before any court or trial justice, or such matters as may be incident thereto, may however be heard and determined and prosecuted to final judgment and execution before such court or justice as if said annexation had not taken place; but upon such annexation taking place, the several courts and trial justices having jurisdiction over the respective towns to which the territory within said towns of Enfield, Greenwich and Prescott is annexed shall have jurisdiction of all civil actions, matters of probate and insolvency and criminal prosecutions thereafter begun, although the cause of action has accrued, or crime, offense or misdemeanor has been committed, before such annexation, in the same manner and to the same extent as if such territory had been annexed prior to the accrual of the cause of action or the commission of the crime, offense or misdemeanor.

SECTION 16. An inhabitant of the town of Enfield, Greenwich or Prescott, when annexed to an adjacent town by authority of this act, who remains upon the annexed territory, or who removes to a place within the limits of the town to which the land upon which he resided has been annexed, as such limits existed prior to such annexation, shall have the same right to vote at a town meeting in such town, or at an election of town officers, that he would have had if the annexed territory had constituted a part of said town for six months prior to such meeting or election.

SECTION 17. During any interval between the annexation of said towns of Enfield, Greenwich and Prescott

and the taking possession of the land taken therein by the commission under this act, the commission shall maintain the public ways, public schools and other public works and public institutions in said towns to such extent and in such manner as the commission may deem necessary for the convenience, comfort and welfare of the inhabitants remaining therein.

SECTION 18. No person shall acquire against the commonwealth any rights by prescription or adverse possession in any lands or rights in lands of the commonwealth acquired by the commission under the provisions of this act or of chapter three hundred and seventy-five of the acts of nineteen hundred and twenty-six.

SECTION 19. The commission may at any time sell at public or private sale, or exchange or lease any property, real or personal, or any easement or water right including any land in new cemeteries provided for in section nine of this act, whether taken by eminent domain or otherwise acquired, which in the opinion of the commission is no longer needed for the purposes of this act. Any sums of money so received shall be applied by the state treasurer to construction costs or to reduce the bonded indebtedness for the works. The commission, and after said works have been turned over to the metropolitan district commission, the metropolitan district commission, may by lease, license or contract permit the construction and maintenance on or over any land or waters under its control, of towers, poles, wires and other structures for the purpose of transmitting electric power, and may construct, maintain and operate such power plants and other structures as may in its opinion be necessary to utilize the fall of water created at any of the dams, channels, tunnels, or other structures under its control, for the production of power or electricity; may locate, construct and maintain lines for transmitting the same; and may use, sell or contract for the sale or

use of any power or electricity so created, and any sums of money so received shall be applied to reduce the charges of maintenance of the metropolitan water district.

SECTION 20. The provisions of sections six and seven of chapter fifty-nine of the General Laws shall be applicable to land acquired in fee by the commission under this act for reservoir purposes or for the protection of the reservoir except to land within the present limits of the towns of Enfield, Greenwich and Prescott. On the land in these three named towns acquired previous to the date of their annexation, the commission shall pay to each said town in which the respective land is located until such time as the annexation of said town, as provided in section thirteen of this act, a sum in lieu of taxes computed and paid as provided in said sections six and seven of said chapter fifty-nine, but including for this period the buildings and structures thereon. Subsequent to said annexation neither the commission nor the metropolitan district commission shall pay any taxes or make any payments in lieu of taxes on land or buildings within the present limits of the said towns of Enfield, Greenwich and Prescott.

As full compensation for any loss of taxation or any other loss caused by the carrying out of the provisions of this act, the commission shall pay to the county of Hampshire the sum of fifty-five thousand dollars, which sum shall be paid at the time of the annexation of the towns of Enfield, Greenwich and Prescott to adjacent towns.

SECTION 21. Whenever by the provisions of this act the commission is required to make annual payments over a period of years, it may by agreement with the parties interested make a settlement by payment of a liquidated amount, if it deems it advisable so to do.

SECTION 22. Any town or fire or water district on the

water shed of the Swift river may take from this river above any dam constructed under this act across said river so much of the water thereof as it has already been or may hereafter be authorized by the legislature to take for supplying its inhabitants with water, and in case any such town or district shall hereafter on its application therefor be authorized to take such water, the point of connection with and entrance into said river or any pond, reservoir or waters thereof and the location of any pipes, aqueducts, conduits, wells or other water courses laid or constructed on land of the commonwealth shall be determined by agreement between such town or district and the metropolitan district commission, and such town or district shall pay to the commonwealth for the account of the metropolitan water district, all damages to the land, structures or other property of the commonwealth caused by such taking, connection or entrance; and it shall further pay to the commonwealth for the account of the metropolitan water district, a fair proportion of the cost incurred by the commonwealth for the acquisition under the provisions of this act of the waters of said river, or rights therein, and for the construction, maintenance and operation of such works and structures as are authorized by this act, including a fair proportion of the cost of maintaining the purity of said water, the said damages and proportion to be determined by the metropolitan district commission and by such applicant town or district, and, if they cannot agree, such damages and proportion shall be determined by a master to be appointed by the supreme judicial court on petition by the commonwealth or said applicant town or district, and the report of the master, when affirmed by said court, shall be final and conclusive upon all parties.

SECTION 23. No persons shall, after the passage of this act, erect a dam for mill purposes across the Swift river, or any of its tributaries above the village of Bonds-

ville, without the consent in writing of the commission, or, after said works have been turned over to the metropolitan district commission, of said metropolitan district commission. In granting its consent, either commission may impose such conditions as it may deem to be for the public interest. Any person who is constitutionally damaged in his property by the refusal of such consent or by the imposition of such conditions, may recover from the commonwealth the damage so caused in the manner provided in section four of this act.

SECTION 24. The supreme judicial court or any justice thereof and the superior court or any justice thereof, during a sitting of the court or in vacation, on the petition of the commission or of any city, town, corporation or person interested, or of the attorney of any such petitioner, shall have jurisdiction in equity or otherwise to enforce the provisions of this act and of any rule, regulation or order made under the authority of the same and to prevent any violation of said provisions, rules, regulations or order; provided, however, that no suit in which the right of the commission to make any taking authorized by this act is questioned shall be brought except in the supreme judicial court for the county in which said taking has been made or is to be made, nor unless the said suit is brought within six months after the passage of this act.

If any part, subdivision or section of this act shall be declared unconstitutional the validity of its remaining provisions shall not be affected thereby.

SECTION 25. All general laws relating to the water supplies of cities and towns or the lands and other property used for such supplies and the provisions of sections ten to twenty-three, inclusive, of chapter ninety-two of the General Laws shall in so far as they are not inconsistent with the provisions of this act apply to and be observed in carrying out the purposes of this act. The

provisions of chapter three hundred and seventy-five of the acts of nineteen hundred and twenty-six shall continue in force except as modified by the provisions of this act, but nothing in this act shall be held to authorize any taking or diversion of the waters of the Ware river in excess of that authorized under the provisions of said chapter three hundred and seventy-five of the acts of nineteen hundred and twenty-six.

SECTION 26. Any church or religious society established in the towns of Dana, Enfield, Greenwich, New Salem or Prescott may within five years from the passage of this act file in the probate court or in the supreme judicial court for the county in which such town is located a petition in equity representing that by reason of the construction of the reservoirs and other works contemplated by this act it will be impracticable for such church or religious society thereafter to continue its services of worship or otherwise to carry out the purposes for which it was established and thereupon, after such notice to the attorney general and other persons interested as the court in which such petition is filed may direct, said court may authorize such church or religious society to convey by deed all property real and personal held by it for its own purposes or upon any trust (including the beneficial interest in any trust property held for the benefit of such church or religious society, also any and all contingent rights and interests and any right to damages vested in such church or religious society under the terms of chapter three hundred and seventy-five of the acts of nineteen hundred and twenty-six or under the terms of this act) to such appropriate person or corporation as the court may determine, to be held and administered by such person or corporation in such manner and upon such trusts as the court may designate and may further direct that upon the making of such conveyance and upon the filing of a certified copy of the

deed and of the decree authorizing the same in the office of the secretary of the commonwealth such church or religious corporation shall be deemed to be dissolved. If any property conveyed pursuant to a decree entered upon such petition shall thereafter be taken under the provisions of either of said acts, the person or corporation to which such property shall have been so conveyed shall have the same right to damages as such church or religious society would have had if it had not conveyed such property. Before entering a decree as hereinbefore provided, the court shall ascertain whether any rights by way of reverter or otherwise are vested in any person or corporation in any property held by or for the benefit of such church or religious society upon the dissolution of such church or religious society, the discontinuance of its activities, its ceasing to use said property or any other contingency, and, if it shall appear that a conveyance of any such property as hereinbefore provided would be inconsistent with any such rights, the court, if any action appears to be necessary in order to effect a lawful and complete disposition of such property, shall direct that the same be conveyed to the person or corporation found to be entitled thereto in the existing state of things or devise a plan for the application thereof in a manner consistent with such rights. The remedies hereby given shall be in addition to any remedies afforded by existing law.

SECTION 27. For the purpose of carrying out the provisions of this act, the commission may expend such amounts not exceeding in the aggregate fifty million dollars, as may from time to time be approved by the governor and council. To meet such expenditures, the state treasurer shall, from time to time, on the request of the commission and subject to such approval, issue bonds of the commonwealth to an amount not exceeding the sum of fifty million dollars, which shall be a further

addition to the loans authorized by section eight of chapter three hundred and seventy-five of the acts of nineteen hundred and twenty-six, and by section six of chapter one hundred and eleven of the acts of nineteen hundred and twenty-seven.

Such bonds shall be issued as coupon or registered bonds, for such term of years as may be recommended by the governor, in accordance with section three of Article LXII of the amendments to the constitution, and shall bear interest at such rate as shall be fixed by the state treasurer, with the approval of the governor and council. The amounts necessary to meet interest and serial payment requirements on said bonds and the expenses of maintaining and operating the works to be constructed by the commission under this act, and such other expenses as may be authorized hereunder, shall be added to the annual assessments upon the cities and towns comprising the metropolitan water district and apportioned and collected as provided by section twenty-six of chapter ninety-two of the General Laws.

Approved April 26, 1927.

APPENDIX B*

THE COMMONWEALTH OF MASSACHUSETTS
METROPOLITAN DISTRICT
WATER SUPPLY COMMISSION

DAVIS R. KENISTON
Chairman
CHARLES M. DAVENPORT
JOSEPH H. SOLIDAY
Commissioners
FRANK E. WINSOR
Chief Engineer

24 SCHOOL STREET, BOSTON

NOVEMBER 30, 1927.

SUBJECT: — WARE RIVER DIVERSION

War Department
United States Engineer Office
13th Floor, Custom House
Boston, Mass.

GENTLEMEN: — The letter from your department, signed by S. A. Cheney, Colonel, Corps of Engineers, District Engineer, dated November 22, 1927, directed to this Commission in reference to the contemplated diversion of the waters of the Swift and Ware Rivers for the purpose of procuring an additional water supply for the Metropolitan District received.

The diversion of waters referred to is of the Ware River authorized by Chapter 375 of the Acts of 1926 (Massachusetts) and of the Swift River authorized by Chapter 321 of the Acts of 1927 (Massachusetts), both rivers being entirely within the State of Massachusetts and being non-navigable. Copies of both of these Acts are attached hereto.

In accordance with the letter from your department

* Inserted by amendment, allowed December 2, 1929.

and as suggested by Colonel Cheney in a recent conference, this Commission hereby makes formal application for a permit for the diversion of the waters of the Ware River in accordance with the terms of Chapter 375 of the Acts of 1926 which provides so far as said diversion is concerned as follows:

SECTION 1, Paragraph 2 — "The commission, on behalf of the commonwealth, shall forthwith for the purpose of extending and increasing the water supply of the metropolitan water system, and of such cities and towns not members of the metropolitan water district as may hereafter require water from said system, divert into the Wachusett reservoir of said district the flood waters, as defined in section four, of the Ware river at a point in the town of Oakham or the town of Barre not more than one mile from the bridge of the Boston and Albany railroad crossing said river in the village of Coldbrook, and construct as a part of the metropolitan water system, such works as may be necessary for such extension and increase, and all structures and appurtenances incidental or complementary thereto; provided, that said flood waters shall not be so diverted between May thirty-first and December first in any year unless such diversion be first approved by the state department of public health."

SECTION 4, Paragraph 1 — "For the purposes of this act, the flood waters of the said Ware river which the commission is authorized to divert as provided in section one are hereby defined to be the waters thereof at and above the point of diversion established under section one in excess of a flow of eighty-five million gallons a day, meaning thereby that on any day when the natural flow of said river is less than eighty-five million gallons no water shall be diverted."

This matter was taken up by Mr. Winsor, Chief Engineer of this Commission, with Major Fowler of the Providence office early in the year, and it was our impression that if anything further was required on the part of the War Department, we would be notified. Work has been going on since that time and in view of the immediate necessity of the Boston Metropolitan District for an additional water supply, and the serious danger of a water shortage unless this work is prosecuted to the earliest possible completion, we cannot too strongly urge that a permit be immediately granted.

Respectfully,

METROPOLITAN DISTRICT WATER
SUPPLY COMMISSION,

By (Sgd) DAVIS B. KENISTON,
Chairman.

Incls:
DBK : CH

Copy

7510 (Mass. Metro. Dist. Water Comm.) 1. Subject: Application for permission to divert water from Ware River, Mass.

6TH IND.

Office, C. of E. March 6, 1928. — To the Secretary of War.

1. The Metropolitan District Water Supply Commission of the State of Massachusetts has made application for permits to divert excess waters from Ware River and the major part of the flow of the Swift River for an additional water supply for the Boston Metropolitan District. The particular application under consideration in this indorsement refers to the excess waters of the Ware River.

2. Both rivers lie wholly within the State of Massachusetts. They rise in the central part of the State, flow in a southerly direction and uniting with the Quaboag River, form the Chicopee River. The latter flows westward to the Connecticut River.

3. Both applications contemplate the transfer from the Connecticut basin of a portion of the waters naturally tributary thereto, and their diversion through a tunnel to another watershed. In the case of the Swift River it is proposed to construct a storage reservoir and a very large proportional diversion is requested. The application for the Swift River requires further detailed study to arrive at a close determination of its effects on the navigable capacity of the Connecticut. These studies have not progressed sufficiently to enable me to state at this time the amount of allowable diversion or exact conditions under which diversion may be possible without adverse effect on the Connecticut. No storage is proposed in the case of the Ware River and no diversion except when the flow is in excess of

85,000,000 gallons per day (about 131 cubic feet per second), with the proviso that no water shall be diverted between May 31 and December 1 in any year unless first approved by the State Department of Public Health. The proposed Swift River diversion presents a complicated question. The Ware River application involves no unusual difficulties.

4. The drainage area of the Swift River above the lower end of the reservoir, is about 186 square miles. The drainage area of the Ware above the proposed point of diversion is about 98 square miles. The drainage area of the Connecticut is about 11,000 square miles.

5. Objections to the proposed diversion have been presented both in writing and orally by representatives of the State of Connecticut, the City of Hartford and the Hartford and New York Transportation Company. The Division Engineer has raised the question of the adverse effect on power development at Enfield Rapids, Conn. The State of Connecticut has instituted an action in the Supreme Court of the United States to restrain the taking of any part of the waters of the Ware, Swift and other rivers, basing its contention only incidentally on adverse effects on navigable capacity of the Connecticut.

6. After a study of the Ware River application had been made, the District Engineer of the Providence District held a public hearing at Springfield, on the 9th ultimo to give the States of Massachusetts and Connecticut and all interested parties opportunity to present their views. At the hearing no attempt was made by either side to controvert the finding set forth in the notice of hearing that the navigable depth of the Connecticut will not be affected by diversion between October 15 and June 15 except to the extent of an average of 0.6 of a day per year. . . .

7. The records of discharge of the Ware River for the years 1913–1926 indicate that a volume of flow in excess of 131 cubic feet per second at the proposed point of diversion did not occur on any day between October 15 and June 15 of those years when the Hartford gauge at 8 a.m. was below 2 feet. The same records indicate that a volume of flow in excess of 131 cubic feet at the proposed point of diversion has occurred only on an average of 0.7 of a day per year when the Hartford gauge at 8 a.m. was below 3 feet. The maximum amount thus capable of diversion occurred on December 15, 1924, when the volume of flow was 170 cubic feet per second and the gauge reading at Hartford was 2.7 feet. The possible amount that could then have been diverted was 39 cubic feet per second. The effect on gauge heights or navigable depths by the diversion of that amount would be imperceptible. These flashy and insignificant occurrences on the Ware are not reflected by the gauge at Hartford as much as are wind and tide effects. . . .

8. . . . In my judgment the use of excess waters from the Ware, as outlined above, will not have any injurious effect on navigation irrespective of any diversion which may be authorized from the Swift. Furthermore a proper regulation of the Swift River by storage of flood waters may be actually beneficial by making possible an increase of flow during dry periods. By careful and economical usage flood stages may be slightly lowered, navigable depth slightly benefited and diversion of reasonable amounts for water supply made feasible.

9. The applicant is very desirous of a decision concerning the Ware River application as soon as possible. So far as the interests committed to this Department are concerned, I see no reason for deferring action in the case. In my opinion the proposed diversion of waters in excess of 85,000,000 gallons per day (131 cubic

feet) will have no adverse effect on the navigable capacity of the Connecticut River. In view of the controversy before the Supreme Court, it seems inadvisable to issue a formal permit for the present but to inform the applicant that no objection will be interposed by the War Department to the diversion of the flood waters exceeding 85,000,000 gallons per day for the period October 15 to June 15, of each year. Approval of this course of action is recommended.

(Signed) EDGAR JADWIN
Major General,
Chief of Engineers.

Approved March 14, 1928.

(Signed) DWIGHT F. DAVIS,
Secretary of War.

WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
PROVIDENCE, R. I.

Refer to file No. Comm. 64 1-104 MARCH 19, 1928.

Metropolitan District Water Supply Commission, The Commonwealth of Massachusetts, 24 School Street, Boston, Massachusetts.

GENTLEMEN:—Referring to your application of November 30, 1927, for federal authority for the diversion of the flood waters of the Ware River for an additional water supply for the Boston Metropolitan District, this office has been directed by the Chief of Engineers to inform you that no objection will be interposed by the War Department to the diversion of the flood waters of the Ware River exceeding 85,000,000 gallons per day for the period October 16 to June 15 each year.

For and in the absence of Colonel S. A. Cheney, Corps of Engineers, District Engineer.

Very respectfully,

THOS. R. McELROE (Sgd.),
Chief Clerk.

APPENDIX C*

THE COMMONWEALTH OF MASSACHUSETTS
METROPOLITAN DISTRICT
WATER SUPPLY COMMISSION

DAVIS R. KENISTON
Chairman
CHARLES M. DAVENPORT
JOSEPH H. SOLIDAY
Commissioners
FRANK E. WINSOR
Chief Engineer

24 SCHOOL STREET, BOSTON

NOVEMBER 30, 1927.

SUBJECT: — SWIFT RIVER DIVERSION

War Department
United States Engineer Office
12th Floor — Custom House
Boston, Massachusetts

GENTLEMEN: — The letter from your department signed by S. A. Cheney, Colonel, Corps of Engineers, District Engineer, dated November 22, 1927, directed to this Commission in reference to the contemplated diversion of the waters of the Swift and Ware Rivers for the purpose of procuring an additional water supply for the Metropolitan District received.

The diversion of waters referred to is of the Ware River authorized by Chapter 375 of the Acts of 1926 (Massachusetts) and of the Swift River authorized by Chapter 321 of the Acts of 1927 (Massachusetts), both rivers being entirely within the State of Massachusetts and being non-navigable. Copies of both of these Acts are attached hereto.

* Inserted by amendment, allowed December 2, 1929.

In accordance with the letter from your department and as suggested by Colonel Cheney in a recent conference, this Commission hereby makes formal application for a permit for the diversion of the waters of the Swift River in accordance with the terms of Chapter 321 of the Acts of 1927 which provides so far as said diversion is concerned as follows:

SECTION 1, 1st Paragraph — "The metropolitan district water supply commission, established by chapter three hundred and seventy-five of the acts of nineteen hundred and twenty-six, hereinafter referred to as the commission, on behalf of the commonwealth, shall forthwith, for the purpose of adding to, extending and further developing the additional sources of water supply of the metropolitan water system provided for in said chapter three hundred and seventy-five, divert into the Wachusett reservoir of the metropolitan water system the waters of the Swift River, and of Beaver brook, a tributary of the Ware river, by the construction of an extension, to the Swift river, of the aqueduct or tunnel between the Wachusett reservoir and the Ware river at or near Coldbrook provided for in said chapter three hundred and seventy-five, and by the construction of a temporary diversion dam as may be required at a point on the Swift river below the confluence of the east and middle branches or at a point on the east branch near the village of Greenwich, and ultimately by the construction of a dam across the Swift river at or near the boundary line between the towns of Ware and Enfield, and of a dam across Beaver Brook at or near said boundary line, thereby creating a storage reservoir in the Swift river valley. No water shall be diverted or stored in any calendar day when the flow of the Swift river at or just above the village

of Bondsville in the towns of Palmer and Belchertown is less than twenty million gallons; and there shall be discharged from any storage created by the commission above said village a sufficient amount of water to maintain, so far as such storage will allow, a flow of said river at said village of not less than twenty million gallons in each calendar day."

This matter was taken up by Mr. Winsor, Chief Engineer of this Commission, with Major Fowler of the Providence office early in the year, and it was our impression that if anything further was required on the part of the War Department, we would be notified. Work has been going on since that time and in view of the immediate necessity of the Boston Metropolitan District for an additional water supply, and the serious danger of a water shortage unless this work is prosecuted to the earliest possible completion, we cannot too strongly urge that a permit be immediately granted.

Respectfully,

METROPOLITAN DISTRICT WATER SUPPLY COMMISSION,

By (sgd) DAVIS B. KENISTON,
Chairman.

Encls.
DKB: CH (Pw)

THE COMMONWEALTH OF MASSACHUSETTS
METROPOLITAN DISTRICT
WATER SUPPLY COMMISSION

DAVIS R. KENISTON
Chairman
CHARLES M. DAVENPORT
JOSEPH H. SOLLIVAN
Commissioners
FRANK E. WINSOR
Chief Engineer

24 SCHOOL STREET, BOSTON

NOVEMBER 30, 1927

SUBJECT: — WARE AND SWIFT RIVER DIVERSIONS

War Department
United States Engineer Office
13th Floor, Custom House
Boston, Massachusetts

GENTLEMEN: — Supplementing the applications of November 30 from this Commission to the War Department for permits for the Swift and Ware River diversions, your attention is directed to the correspondence now in your files between Major R. E. Fowler, Corps of Engineers, District Engineer at Providence, and Frank E. Winsor, Chief Engineer of this Commission, covering the period from January 25 to March 9, 1927. This Commission inferred from this correspondence that the War department had taken or would take the view that the proposed diversion from the Ware River would be no detriment to the navigable depth of the Connecticut River and that the proposed diversion from the Swift River would not be objected to unless or until the War Department, after taking into account various other factors influencing the flow of the Connecticut, such as storage held and released by mills, power companies, etc. in ponds and storage reservoirs, should demonstrate that

such diversion would reduce the navigable depth, in which case the War Department might require greater quantities to be released from time to time during the dry season.

The diversion of both the Swift and Ware Rivers is essentially one project so far as a practical and economical development of an additional water supply for the Boston Metropolitan District is concerned.

The Ware River diversion in effect skims off the flow as it occurs in excess of 85,000,000 gallons, which is equivalent to 1.34 cubic feet per second per square mile from the approximate 98 square miles of drainage area affected (prior to a recent survey this area was assumed to be about 100 square miles). This flow of 1.34 cubic feet per second unaffected by the diversion is several times the average dry weather flow of the Ware River.

The Swift River diversion is from about 186 square miles and there is guaranteed a flow in the Swift River at Bondsville, about five miles below the proposed Swift River Reservoir, of 20,000,000 gallons a day, the drainage area at Bondsville being about 195 square miles. The guaranteed flow is 0.16 cubic feet per second per square mile. The drainage area of 186 square miles is 1.71% of the drainage area of the Connecticut River of 11,400 square miles and from this 186 square miles sufficient water is released to insure a flow of 0.16 cubic feet per second per square mile from 195 square miles of drainage area. There will be no reduction but a slight increase in the flow of the Swift River in the driest times and during the usual dry season the average reduction in flow of the Connecticut River will correspond to a reduction of drainage area of that river not greater than one per cent. The effect on the flow of the Connecticut River of so small a diversion will, it is believed, be immeasurable so far as reducing the navigable depth is concerned.

During the past year the Commission has expended a

large amount of money on the Ware and Swift River projects, including the cost of sinking of shafts preparatory to the construction of the tunnel which is necessary for making available the flood waters of the Ware River. Satisfactory bids for the construction of the tunnel itself were received on November 18. This contract if awarded in the immediate future and if completed in the time specified will permit the diversion of Ware River water into the Wachusett Reservoir in the winter or spring of 1931, before which time no water can be diverted. To suspend operations at this time would not only involve the Commonwealth in a heavy financial loss, but would also delay procuring the additional supply of water badly needed by the Metropolitan District at the earliest possible date.

The Swift River diversion cannot be begun until the tunnel is extended from the Ware River to the Swift River and it is estimated that the earliest time at which water could be diverted from the Swift River would be during 1933.

There is inclosed herewith preliminary blueprint of plan, Accession 617, being a general plan of the Metropolitan Water Supply.

Respectfully,

METROPOLITAN DISTRICT WATER
SUPPLY COMMISSION,

By (Sgd) DAVIS B. KENISTON,
Chairman.

FEW : AW
Inclosure

COPY

7510 (Mass. Metro. Dist. Water Supply Com.) 2. Subject: Swift River Diversion.

7TH IND.

Office, C. of E., May 9, 1929. — To the Secretary of War.

1. On November 30, 1927, the Metropolitan District Water Supply Commission of Boston, at the written suggestion of the District Engineer, Providence District, made a formal application for a permit to divert water from the Swift River, Massachusetts, in accordance with the terms of Chapter 321 of the Acts of 1923 of that State. On the same date, the Commission also made application for a permit to divert water from the Ware River, Massachusetts, in accordance with the terms of Chapter 375 of the State Acts of 1926.

2. Those rivers rise in the central region of Massachusetts and flow southerly and westerly to a junction forming the Chicopee River which flows westerly and empties into the Connecticut at a point about 9.5 miles north of the boundary between Massachusetts and Connecticut.

3. On March 14, 1928, the Secretary of War approved a recommendation of the Chief of Engineers that the applicant be informed that no objection would be interposed by the War Department to the diversion from the Ware River of the flood waters exceeding 85,000,000 gallons per day for the period October 15 to June 15, of each year. This approval was given by the Secretary of War with the understanding that such action would not affect the consideration of the Swift River application.

4. The Swift River application contemplates the storage of its flow and its possible diversion with the exception of 20,000,000 gallons of water per day into the Wachusett Reservoir, situated about 30 miles eastward of the point of diversion and in another watershed.

Storage would be provided first by a temporary dam to be constructed below the confluence of the east and middle branches of the Swift River or at a point on the east branch near the village of Greenwich, and ultimately by the construction of a dam across the Swift River at or near the boundary of Ware and Enfield, and of a dam across Beaver Brook at or near said boundary line.

5. No permit is required for any of the diversion structures as the Swift River and its various branches, as well as Beaver Brook, are non-navigable streams. The jurisdiction of the War Department in cases of this kind begins when the appropriation or regulation of the waters of a non-navigable tributary is of such extent as "to alter or modify the . . . condition or capacity of . . . the channel of any navigable water of the United States". Since such alteration or modification without previous recommendation and authorization of the Chief of Engineers and the Secretary of War is unlawful, the War Department is interested in determining whether the amount of such appropriation or regulation would probably demand institution of Federal proceedings to preserve substantially the navigability of navigable waters.

6. This particular case has been studied in great detail during the past 17 months by the District Engineer at Providence, the Division Engineer at New York and the Office of the Chief of Engineers. Full opportunity has been given to the representatives of the Metropolitan District Water Supply Commission and of the State of Connecticut and other interested parties, to present data and to inform themselves of the progress of these studies.

7. The State of Connecticut presented objections based on both legal and engineering grounds. All such legal questions have been answered so far as concerns the interests entrusted to the Department. No attempt has been made to answer the fundamental questions of law involved as to the right to divert water from one

watershed to another, inasmuch as the State of Connecticut has instituted an action in the Supreme Court of the United States to restrain the taking of any part of the water of the Ware, Swift and other rivers. It is believed that the decision of such issues should be left to that tribunal. The objections which have been raised on engineering or navigation grounds are referred to later in this indorsement.

8. The watershed of the Connecticut River above the Massachusetts-Connecticut boundary is 9,915 square miles. The drainage area of the Swift River involved in this application is approximately 186 square miles. The mean annual discharge of the Connecticut River at the State Line is about 17,000 cubic feet per second and the mean annual discharge of the Swift River at the proposed dam site, about 300 cubic feet per second. The discharges of both rivers are affected and regulated to a considerable extent by mill and power dams which temporarily store water to suit occupational uses. The stage of the river at Hartford is indicated by a gauge at that point. The surface elevations are affected by tide and wind. The best information of normal flow conditions of the Connecticut River is afforded by the records of the United States Geological Survey gauge at Sunderland, Massachusetts, located on that river about as far above Hartford as the site of the proposed dam on the Swift River. Study of the gauge records indicate that critical stages normally occur between June 15 and November 15. The critical period for navigation is taken as from June 1 to November 30.

9. The legislation of the State of Massachusetts prescribes that there shall be maintained a minimum flow of water of 31 cubic feet per second at Bondsville at a gauge located on the Swift River below the site of the proposed impounding dam, and where the tributary drainage area is 8 square miles in excess of that above that dam.

10. The results of the studies made by and under the direction of this office were submitted for comment to the representatives of the Metropolitan Water Supply District of Boston and to the representatives of the State of Connecticut. Both groups were in this office many times in discussions and conferences on both the legal phases and the navigation features of the case. In general, the representatives of Massachusetts indicated originally the opinion that the Office of the Chief of Engineers was magnifying the effect on navigation of the proposed appropriation of water in excess of 31 cubic feet per second. They stressed the desirability of early action by the Department to define the limits beyond which Massachusetts could not appropriate water without violating the provisions of the River and Harbor Act of March 3, 1899. On the other hand, the representatives of the State of Connecticut claimed that the proposals of the Department would not assure a 2-foot stage on the Hartford gauge; furthermore, that the maintenance of a 3-foot gauge rather than a 2-foot gauge was a better measure of the navigable capacity of the Connecticut River. Principally, however, the representatives of Connecticut strongly urged against any action positive or negative or inferential which permitted or which would permit or acquiesce to any degree in any diversion from the watershed of the Connecticut River to any other watershed.

11. The applicant is very desirous of obtaining a definite statement as to the limits of appropriation of water from the non-navigable Swift River which may be possible without substantially altering the condition or capacity or the channel of the navigable Connecticut River. In addition to the exhaustive study of the engineering data pertinent to the interests committed to the War Department, this office has taken into consideration the possible bearing upon Department action in this matter of the decisions of the Supreme Court in

the cases of the United States *vs.* Rio Grande Dam Irrigation Company and of the State of Wisconsin and other states *vs.* the State of Illinois and Sanitary District of Chicago, both of which involve questions regarding diversions affecting navigable waters. In the action hereinafter suggested, it is felt that the proposed position of the War Department will in no way prejudice the litigation now pending before the Supreme Court.

It is recommended that the applicant be informed as follows:

(a) It is the duty of the War Department to institute proceedings to preserve the substantial navigability of navigable waters of the United States when the appropriation or regulation of the waters of a non-navigable tributary affects, substantially alters or modifies the condition or capacity of the channel of a navigable water.

(b) The War Department is unwilling to admit that the appropriation of water from the Swift River to the extent proposed in this application might not, on occasion, have an appreciable effect on the navigable capacity of the Connecticut River.

(c) Limited amounts of water may be appropriated from the Connecticut River basin above the Connecticut-Massachusetts State Line, without substantially diminishing the navigability of that stream within the limits of present navigability.

(d) It is found that a discharge of 4,900 cubic feet per second at Sunderland, Massachusetts, corresponds to average lower low tide gauge height of 2.1 at Hartford, Connecticut and that a discharge of 4,650 cubic feet per second at Sunderland corresponds to an average lower low tide gauge height of 2.0 at Hartford.

(e) From the studies of past records it appears there will be no substantial alteration or modification of the condition or navigable capacity of the channel of the navigable portion of the Connecticut River if

the flow of water from the Swift River as provided in the terms of Chapter 321, of the Acts of 1927 (Massachusetts) be augmented during the critical period from June 1 to November 30, both inclusive, so that the measured rate of discharge on the Swift River shall be 70 cubic feet per second on such days as the United States Geological Survey gauge at Sunderland, Massachusetts indicates the discharge of the Connecticut River at that point to be less than 4900 cubic feet per second and more than 4650 cubic feet per second and shall be further augmented so that the measured rate of discharge past the impounding dam on the Swift River shall be 110 cubic feet per second on such days as the Geological Survey gauge at Sunderland Massachusetts indicates the discharge on the Connecticut River at that point to be 4650 cubic feet per second or less.

(f) The rates of discharge set forth in subparagraph (e) are subject to review based on more complete data which may become available in the future.

12. Approval of this course of action is recommended.

[M. & R. DIV.
May 10, 1929
Off. Sec. War]

(s) EDGAR JADWIN

EDGAR JADWIN,
Major General,
Chief of Engineers.

1 Inclo. viz;
Map showing proposed
plan of diversion.

Recommendation of 7th indorsement approved May 11, 1929.

[M & R Div.
May 11, 1929
Off. Sec. War]

(s) JAMES W. GOOD,
Secretary of War.

Sub. 2/6 accpg.

MAY 11, 1929.

COPY

Address Reply to
THE DISTRICT ENGINEER
Room 419, New Federal Building
Providence, R. I.

WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
Providence, R. I.

MAY 17, 1929.

Refer to File No. Conn. 54/1–166

Metropolitan District Water Supply Commission, 24 School Street, Boston, Mass.

GENTLEMEN: — With reference to your application of November 30, 1927 for a permit to divert water from the Swift River, Massachusetts, in accordance with the terms of Chapter 321 of the Acts of 1927 of that State, I have been directed by the Chief of Engineers under date of May 13 to inform you as follows:

(a) It is the duty of the War Department to institute proceedings to preserve the substantial navigability of navigable waters of the United States when the appropriation or regulation of the waters of a non-navigable tributary affects, substantially alters or modifies the condition or capacity of the channel of a navigable water.

(b) The War Department is unwilling to admit that the appropriation of water from the Swift River to the extent proposed in this application might not, on occasion, have an appreciable effect on the navigable capacity of the Connecticut River.

(c) Limited amounts of water may be appropriated from the Connecticut River basin above the Connecticut–Massachusetts State Line, without substantially diminishing the navigability of that stream within the limits of present navigability.

(d) It is found that a discharge of 4900 cubic feet per second at Sunderland, Massachusetts, corresponds to average lower low tide gauge height of 2.1 at Hartford, Connecticut and that a discharge of 4650 cubic feet per second at Sunderland corresponds to an average lower low tide gauge height of 2.0 at Hartford.

(e) From the studies of past records it appears there will be no substantial alteration or modification of the condition or navigable capacity of the channel of the navigable portion of the Connecticut River if the flow of water from the Swift River as provided in the terms of Chapter 321, of the Acts of 1927 (Massachusetts) be augmented during the critical period from June 1 to November 30, both inclusive, so that the measured rate of discharge on the Swift River shall be 70 cubic feet per second on such days as the United States Geological Survey gauge at Sunderland, Massachusetts indicates the discharge of the Connecticut River at that point to be less than 4900 cubic feet per second and more than 4650 cubic feet per second and shall be further augmented so that the measured rate of discharge past the impounding dam on the Swift River shall be 110 cubic feet per second on such days as the Geological Survey gauge at Sunderland, Massachusetts indicates the discharge on the Connecticut River at that point to be 4650 cubic feet per second or less.

(f) The rates of discharge set forth in subparagraph (e) are subject to review based on more complete data which may become available in the future.

Very respectfully,

(Signed) F. S. SKINNER
Major, Corps of Engineers,
District Engineer.

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In the Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 13, ORIGINAL.

THE STATE OF CONNECTICUT,
COMPLAINANT,

v.

THE COMMONWEALTH OF MASSACHUSETTS,
DEFENDANT.

BRIEF OF THE DEFENDANT, THE COMMONWEALTH OF MASSACHUSETTS, IN OPPOSITION TO THE MOTION OF THE COMPLAINANT TO JOIN THE SECRETARY OF WAR AND THE CHIEF OF ENGINEERS, UNITED STATES ARMY, AS PARTIES RESPONDENT.

JOSEPH E. WARNER, *Attorney General of the Commonwealth of Massachusetts.*

BENTLEY W. WARREN, *Special Assistant Attorney General of the Commonwealth of Massachusetts.*

GERALD J. CALLAHAN, *Assistant Attorney General of the Commonwealth of Massachusetts.*

R. AMMI CUTTER, *Assistant Attorney General of the Commonwealth of Massachusetts.*

ADDISON C. GUILCHELL & SON, LAW PRINTERS, BOSTON.

SUBJECT INDEX.

	Page
Concise statement of the case	1
Summary of the contentions of the Commonwealth of Massachusetts in opposition to the allowance of the pending motion	4
Points and authorities (for detailed statement, see summary of argument, pp. 4 to 6)	7
Conclusion	36

TABLE OF CASES CITED.

Florida v. Mellon, 273 U.S. 12	19, 29, 33, 35
Kansas v. Colorado, 185 U.S. 125	21
Louisville Bridge Co. v. United States, 242 U.S. 409	19, 25, 29
Massachusetts v. Mellon, 262 U.S. 447	29, 30, 33, 34, 35
Miller v. Mayor, 109 U.S. 385	25
Missouri v. Holland, 252 U.S. 416	30, 31, 34
Monongahela Bridge Co. v. United States, 216 U.S. 177	25
New Jersey v. Sargent, 269 U.S. 328	29, 33
New York v. Illinois & Sanitary District, 274 U.S. 488	19, 33
Pennsylvania v. Wheeling Bridge Co., 18 How. 421	25
Philadelphia Co. v. Stimson, 223 U.S. 605	25, 29
Port of Seattle v. Oregon &c. R. Co., 255 U.S. 56	23
Sanitary District of Chicago v. United States, 266 U.S. 405	15, 17, 32
South Carolina v. Georgia, 93 U.S. 4	25
Southern Pacific Co. v. Olympian Dredging Co., 260 U.S. 205	25, 29
United States v. Chandler-Dunbar Co., 229 U.S. 53	23, 25
United States v. Rio Grande &c. Co., 174 U.S. 690	13
United States v. River Rouge Improvement Co., 269 U.S. 411	33
Wisconsin v. Illinois and Sanitary District, Nos. 7, 11, 12 Original, October term, 1928, decided January 14, 1929	8, 9, 11, 13, 14, 15, 16, 17, 21, 22, 23, 31

TABLE OF AUTHORITIES CITED.

	Page
Act of March 3, 1899 (see 30 Stat. at L. 1151)	4, 7, 25, 26
Mass. Stat. 1926, c. 375	2, 18
Mass. Stat. 1927, c. 321	2
34 Op. (U.S.) Atty. Gen. 410	10, 13
Special Master's Report, Wisconsin v. Illinois	14, 15, 22
30 Stat. at L. 1151, § 9	7
30 Stat. at L. 1151, § 10	7
30 Stat. at L. 1151, 1153, § 18	25
U.S. Code, Tit. 33, § 401	7
U.S. Code, Tit. 33, § 403	7
U.S. Code, Tit. 33, § 502	25
U.S. Const., art. I, § 8, cl. 3	23

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v.

THE COMMONWEALTH OF MASSACHUSETTS,

DEFENDANT.

BRIEF OF THE DEFENDANT, THE COMMONWEALTH OF MASSACHUSETTS, IN OPPOSITION TO THE MOTION OF THE COMPLAINANT TO JOIN THE SECRETARY OF WAR AND THE CHIEF OF ENGINEERS, UNITED STATES ARMY, AS PARTIES RESPONDENT.

CONCISE STATEMENT OF THE CASE.

The principal case is an original bill in equity filed by leave of court by the complainant, the State of Connecticut, seeking to prevent and enjoin the defendant, the Commonwealth of Massachusetts, from diverting—

(*a*) the flood waters of the Ware river,
(*b*) certain waters of the Swift river,

both of which streams are non-navigable tributaries of the Connecticut river and are situated wholly within the geographical limits of Massachusetts. The purpose of the proposed diversion, authorized by two acts of the General Court

of Massachusetts (Answer, pp. 33 to 77), is to provide a suitable supply of water for drinking and domestic use for the Metropolitan Area surrounding the City of Boston, which is now threatened with a serious water shortage (Answer, pp. 23-24). The Massachusetts legislation authorizing the project is found in Acts of 1926, c. 375, and Acts of 1927, c. 321.

Connecticut, appearing not only as a proprietor of riparian lands (Bill, p. 6), but also as *parens patriae* (Bill, pp. 2, 6, 10, 13), alleges that the diversion will seriously impair navigation upon the Connecticut river (Bill, p. 10), that it will diminish the flow of water in the river sufficiently to cause damage to the health (Bill, pp. 8, 9, 11, 12), welfare, and property interests of Connecticut and her citizens, and that it will be a violation of the riparian rights (Bill, p. 7) of the State of Connecticut and of the citizens of that State, who can be represented as against another sovereign State of the Union only by the State as *parens patriae*.

Massachusetts in an answer to the bill, filed by leave of court, denies that any injury to navigation, to the State of Connecticut, or to the citizens of that State will result from the proposed diversion, and affirmatively alleges that compared to the total flow in the Connecticut river at the Connecticut–Massachusetts boundary the flow to be diverted is negligible and insignificant (Answer, pp. 1-27). [It appears from the bill (p. 4) that the total watershed of the Connecticut river is 11,300 square miles. The watershed of the Ware river is alleged to be 221 square miles and that of the Swift river is set forth as 213 square miles (Bill, p. 5).] Massachusetts also sets up certain affirmative legal and equitable defenses (Answer, pp. 27-32), including—

(*a*) The existence of an emergency within Massachusetts constituting a justification for a reasonable use of the waters to be taken by the proposed diversion (Answer, pp. 27-28).

(*b*) The existence of an adequate remedy at law in the State of Connecticut and its citizens for compensation by

way of money damages for any incidental injury caused to the State or its citizens (Answer, pp. 24-25, 28-29).

(*c*) The serious injury to the welfare of the citizens of Massachusetts, if the diversion is prohibited, compared to the negligible and trivial damage to Connecticut and its citizens possibly caused if the diversion is permitted, which should lead a court of equity to give substitutional relief rather than specific relief.

(*d*) The contention that the claim of Connecticut goes beyond a claim in behalf of the State in its true capacity as *parens patriae*.

(*e*) The contention that, so far as relief is sought for interference with navigation, the matter is one delegated under due constitutional authority by the Congress of the United States to the Secretary of War and his subordinates.

(*f*) The contention that the diversion is one which is *de minimis* and in all respects a reasonable use of the waters of the Swift and Ware rivers by Massachusetts.

(*g*) Laches.

Connecticut now seeks leave to file a motion (of which printed copies were not available to counsel at the time of the preparation of this brief) which is substantially a supplementary bill, requesting that the Secretary of War and the Chief of Engineers be joined as parties defendant and that they be enjoined from giving their official approval to the project contemplated by Massachusetts. The approval of the War Department has been sought by Massachusetts through the filing of formal applications for a permit to make the proposed diversions (Motion, par. 3). It appears from the motion that, within the limits approved by the War Department officials, they have determined (Motion, par. 12) or are about to determine (Motion, par. 32) that both the proposed diversions will have no adverse effect upon the navigability or the navigable capacity of the Connecticut river. This determination, so far as appears from this

record, is made in good faith after investigation (Motion, pars. 5, 11, 12, 14, 15, 16, 30) and hearing and after affording Connecticut opportunity to present argument and engineering data, including everything contained in the pending motion (Motion, par. 30). It appears from the motion that the War Department has been considering the application for approval of the Swift diversion since December 6, 1927 (Motion, par. 3).

The motion alleges in general terms, however, that all the evidence before the Secretary of War and the Chief of Engineers should have led those officials to decide that the proposed diversions would constitute an obstruction to navigation (Motion, pars. 9, 10, 11, 12, 14, 15, 16). No substantive facts are set out in the motion from which it can be determined (if the decision of the War Department officials is reviewable at all) whether the Secretary of War was correct in his decision.

Massachusetts now opposes the granting of leave to Connecticut to file the proposed motion and is prepared to oppose the granting of the motion upon its merits.

SUMMARY OF THE CONTENTIONS OF THE COMMONWEALTH OF MASSACHUSETTS IN OPPOSITION TO THE ALLOWANCE OF THE PENDING MOTION.

The Commonwealth of Massachusetts opposes the allowance of the motion presented by the State of Connecticut upon the following grounds:

I. The action of the Secretary of War and of the Chief of Engineers in approving the proposed diversions from the Ware river and the Swift river so far as concerns the Federal interest in navigation constitutes a proper exercise of the authority and duty confided to those officials under the provisions of section 10 of the Act of March 3, 1899. Under that act the duty of determining whether in any

given instance a proposed diversion of water from non-navigable streams, tributary to a navigable water, will be an unreasonable obstruction to navigation or to the navigable capacity of such navigable water devolves upon those officials (see *infra*, pp. 7 to 27).

A. Congress by the first clause of section 10 has prohibited all unreasonable obstructions of the capacity of navigable waters unless they are affirmatively authorized by Congress. The consent of Congress itself (by special statute) must be obtained in order that the types of projects mentioned in section 9 may be permitted. As to projects such as those now contemplated by Massachusetts, which are clearly included within the provisions of the second and third clauses of section 10, Congress by a valid delegation of power has made it the duty of the Secretary of War, upon recommendation of the Chief of Engineers, to determine whether the project shall be approved either because it is an affirmative aid to navigation or because it is in no sense an unreasonable obstruction to navigable capacity (*infra*, pp. 7 to 17).

B. The determination which the Secretary of War and the Chief of Engineers are required to make with respect to the proposed diversions by Massachusetts is purely a determination of the issue of fact committed to them by section 10, of whether the diversions will in fact cause an unreasonable diminution of the navigable capacity of the navigable portions of the Connecticut river. There are no allegations in the Connecticut motion which show or set up any failure on the part of the War Department officials either to act with complete good faith or in compliance with all procedural requirement applicable to the questions pending before them (*infra*, pp. 17 to 20).

C. A determination of an issue of fact within the terms of section 10 made by the Secretary of War and the Chief

of Engineers in good faith and in compliance with all pertinent statutory provisions is final. This Honorable Court will not review such a determination directly, thereby substituting its judgment for that of the War Department, nor will this Court enjoin the War Department officials from performing their duty (*infra*, pp. 20 to 27).

II. No controversy capable of judicial determination exists between the State of Connecticut and the Secretary of War and the Chief of Engineers (see *infra*, pp. 27 to 35).

A. A sovereign State in its proprietary capacity has no standing to enjoin the performance by officers of the United States of duties committed to them by an act of Congress, which is valid and constitutional, unless some property right of the State is immediately and directly threatened by the act of the Federal officials. Inasmuch as the allegations of the pending motion reveal no immediately threatened injury to any property interest of the State of Connecticut by the action of the officials of the War Department in making the determination required of them by statute, Connecticut has no standing to maintain an original bill in this Court against those officials (*infra*, pp. 28 to 35), for that State can obtain complete redress, so far as it is entitled to any relief, by a decree running against Massachusetts.

B. A sovereign State cannot as *parens patriae*, representing the general welfare of its citizens, maintain an original bill in equity to enjoin the action of Federal officers acting in purported compliance with duties imposed upon them by valid acts of Congress (*infra*, p. 35).

POINTS AND AUTHORITIES.

I.

THE ACTION OF THE SECRETARY OF WAR AND THE CHIEF OF ENGINEERS UPON THE APPLICATION FOR APPROVAL OF THE DIVERSION OF THE FLOOD WATERS OF THE WARE RIVER AND THEIR PROPOSED ACTION UPON THE APPLICATION FOR APPROVAL OF THE DIVERSION OF CERTAIN WATERS OF THE SWIFT RIVER CONSTITUTE A PROPER PERFORMANCE OF THE DUTIES DELEGATED TO THEM BY THE ACT OF CONGRESS OF MARCH 3, 1899.

A. The Duty of Determining whether Any Given Diversion of Water, which if Not Diverted will Flow into a Navigable Stream, will Constitute or Cause an Obstruction of the Navigable Capacity of that Stream Devolves upon the Secretary of War and the Chief of Engineers under the Act of March 3, 1899.

Sections 9 and 10 of the Act of March 3, 1899, 30 STAT. AT L. 1151 (U.S. Code, Tit. 33, §§ 401, 403), read as follows:

> "SEC. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War; *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction

is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

"SEC. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner *to alter or modify the* course, location, condition, or *capacity of*, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, *or of the channel of any navigable water of the United States*, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same." (Italics ours.)

The precise nature of the authority and duty delegated by Congress in these sections was recently considered by this Honorable Court in—

> *Wisconsin* v. *Illinois and Sanitary District;* Nos. 7, 11, 12 Original, October term, 1928, decided January 14, 1929.

At pages 12-13 of the Official Advance Sheets appears the following language:

> "The policy carried out in the Act of March 3, 1899, had been begun in the Act of September 19, 1890, c. 907; 26 Stat. 454, 455. Sections 9 and 10 were the rearranged result of the provisions of Sections 7 and 10 of the Act of 1890. A new classification was made in Sections 9 and 10 of the Act of 1899, and substituted for Section 10 of the Act of 1890. The latter provided that the creation of any obstruction to navigable capacity was prohibited, unless 'affirmatively authorized by law' and this was changed so as to read 'affirmatively authorized by Congress.' The change in the words of the first clause of Section 10 was intended to make mere State authorization inadequate. *Sanitary District* v. *United States*, 266 U. S. 405, 429; *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211. It was not intended to override the authority of the State to put its veto upon the placing of obstructing structures in navigable waters within a State and both State and Federal approval were made necessary in such case. *Cummings* v. *Chicago*, 188 U. S. 410. The words 'affirmatively authorized by Congress' should be construed in the light of the administrative exigencies which prompted the delegation of authority in the succeeding clauses. Congress, having stated in Section 9 as to what particular structures its specific consent should be required, intended to leave to the Secretary of War, acting on the recommendation of the Chief of Engineers, the determination of what should be approved and authorized in the classes of cases described in the second and third clauses of Section 10. If the section were construed to require a special authorization by Congress whenever in any aspect it might be considered that there was an obstruction to navigable capac-

ity, none of the undertakings specifically provided for in the second and third clauses of Section 10 could safely be undertaken without a special authorization of Congress. *We do not think this was intended.* [Italics ours.] The Supreme Court of Maine in *Maine Water Co.* v. *Knickerbocker Steam Towage Co.*, 99 Me. 473, took the same general view in construction of the same section. It held that the broad words of the first clause of that section were not intended to limit the second and third clauses and that Congress's purpose was a direct prohibition of what was forbidden by them except when affirmatively approved by the Chief of Engineers and the Secretary of War. We concur in this view.

"The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction."

The court (at p. 13) then adverts to and approves the contemporary construction of section 10 by the War Department, especially as revealed by the Opinion of the Acting Attorney General to the Secretary of War (February 13, 1925), 34 Op. Atty. Gen. 410, 416, where the Acting Attorney General says:

"In my opinion Congress thus intended to delegate to the Chief of Engineers and the Secretary of War an administrative authority to determine a fact; and if they were of opinion that the use of navigable waters in a certain case was not such an impairment of their navigability as to require the prohibition of Congress,

then the construction was 'affirmatively authorized by Congress,' because the administrative agency to which Congress had delegated the ascertainment of the facts had found the fact to be that such use was not for the time being an impairment of navigable capacity such as Congress intended to prohibit.

"I am informed that for a long period of years it has been the practice of the War Department to issue permits under section 10 of the Act of March 3, 1899, without requiring that the particular project be first authorized by special Act of Congress, and that was the policy of the War Department in the specific case of the Sanitary District of Chicago."

The following language of the opinion in *Wisconsin* v. *Illinois and Sanitary District* shows that the court clearly had in mind the precise nature of the determination of fact thus left by Congress to the Secretary of War and to the Chief of Engineers (at pp. 13-14):

"But it is said the construction thus favored would constitute it a delegation by Congress of legislative power and invalid. We do not think so. The determination of the amount that could be safely taken from the Lake is one that is shown by the evidence to be a peculiarly expert question. It is such a question as this that is naturally within the executive function that can be deputed by Congress. . . .

"The construction of Section 10 of the Act of March 3, 1899, was settled by this Court in the decision of the first Chicago Drainage Canal case in 266 U. S. 405, 429. The decision there reached and the decree entered can not be sustained, except on the theory that the Court decided first that Congress had exercised the power to prevent injury to the navigability of Lake Michigan and the other lakes and rivers in the Great Lakes watershed, and second that it could properly and valid-

> ly confer the administrative function of passing on the issue of unlawful injury or otherwise on the Secretary of War, and that it had done so."

Such is this Court's most recent construction of the power and duty confided to the Secretary of War and to the Chief of Engineers by section 10. Briefly, it may be summarized:

1. Congress, by section 10, has declared its decision that no unreasonable obstruction to navigable capacity shall be permitted unless Congress has affirmatively authorized it.

2. Actual assent by Congress itself is necessary to projects covered by section 9. [In the case at bar it appears from the answer (p. 18) that the only dam or other storage reservoir to be constructed by Massachusetts as part of the project will be in the valley of the Swift river, which is in no sense a navigable water of the United States. The Connecticut river itself is not alleged to be navigable above Springfield (Bill, par. 8, p. 4). There is obviously no necessity of action by Congress itself under section 9 in order that approval of the erection of a reservoir in the valley of the Swift river may be obtained.]

3. Congress, by section 10, has delegated to the Secretary of War and to the Chief of Engineers the duty of determining whether any other project (having the necessary or probable result of doing one of the acts mentioned in the second and third clauses of section 10) is reasonable or unreasonable so far as concerns the public interest in the maintenance of navigation for the protection of interstate and foreign commerce. A determination that a project is reasonable constitutes an affirmative authorization by Congress.

[We submit that it cannot successfully be maintained that the authority given by the second and third clauses of section 10 to the Secretary of War and to the Chief of Engineers does not include the power to determine the propriety of diversions from non-navigable tributaries of navigable

waters. The third clause of section 10 (see *supra*, p. 8) reads, in part:

> ["And it shall not be lawful . . . in any manner to alter or modify the . . . capacity . . . of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

[These words are broad and inclusive in meaning and they have been liberally construed to include affecting by diversions the navigable capacity of a navigable water, as in the *Chicago Drainage Canal* cases. (See 34 Op. Atty. Gen. 410, 416.) It is obvious that a diversion from a nonnavigable tributary of a navigable water may have fully as great an effect upon the navigable capacity of that water as a direct diversion from that water itself.

> [*United States* v. *Rio Grande &c. Co.*, 174 U.S. 690, 708.

[The purpose of Congress in making the prohibition contained in the first clause of section 10 would require the Secretary's authorization not only of a direct diversion from a navigable water but of an indirect diversion as well.]

The case of *Wisconsin* v. *Illinois* further defines the standards under which the Secretary and the Chief of Engineers must act in granting or withholding approval under section 10. We contend that these standards may be summarized so far as they affect diversions of water which otherwise would augment navigable waters.

(*a*) Diversions which *unreasonably* diminish the navigable capacity of navigable waters can only be authorized in furtherance of the protection and improvement of navigation. Reasons other than the improvement of navigation cannot be availed of by the Secretary as a basis for the approval of such a project.

(*b*) "The normal duty of the Secretary of War under Section 10 . . . is to maintain the navigable capacity of" (at p. 16) existing navigable waters rather than to sacrifice their capacity by diversions.

(*c*) There are certain projects having no relation to the improvement of navigation, but within the terms of the second and third clauses of section 10. If the Chief of Engineers recommends to the Secretary of War that such a project be approved on the ground that it will have no unreasonable adverse effect upon the navigable capacity of any stream, the Secretary acts within the scope of section 10 in permitting the project to be carried into effect (see *Wisconsin* v. *Illinois*, *supra*, at pp. 12 to 13; see *supra*, p. 10). In approving such projects the standard upon which the Secretary's determination is based is the effect of the proposed project upon existing navigable capacity.

The facts in the *Chicago Drainage* cases show that the War Department had in those cases consistently recognized the three principles of action just outlined. This is apparent from the action of successive Secretaries upon applications by the Sanitary District for approval of diversions. The permits granted fall into two groups:

1. It appears from the opinion (p. 6 *et seq.*) that the Sanitary District had in 1896, 1897, 1898, 1899, 1901, and 1903 obtained permits from the Secretary of War to divert water through the Sanitary Canal at a maximum rate under no permit greatly in excess of 4167 cubic feet per second (250,000 cu. ft. per min.). These permits were granted for a purpose clearly not very materially in aid of navigation, apparently upon the theory that such a diversion would not have any unreasonable adverse effect upon existing navigable capacity (with the possible exception of the permit of January 17, 1903, allowing a temporary additional diversion for the purpose of removing sewage deposit along the shores of a navigable water—see Special Master's Report, *Wisconsin* v. *Illinois*, p. 43). All of the permits above mentioned

by their terms (see Special Master's Report, *supra*, pp. 34 to 43) show a zealous desire on the part of the Secretary to preserve existing navigable capacity, at the same time permitting such diversions as would not cause an obstruction to existing navigable capacity. In 1907 and in 1913 (see Special Master's Report, pp. 48, 60-66), in consistent pursuance of this policy of the Department, applications for further diversions were refused by the Secretary on the ground that they would impair the navigable capacity of waters already used for navigation. In *Sanitary District of Chicago* v. *United States*, 266 U.S. 405, 429, the whole course of action by the successive Secretaries was comprehensively reviewed, and not only by the language of the decision, but also by the result of it, the rationale of their construction of section 10 was approved (see especially p. 429) by this Court.

2. The other type of permit considered in the case of *Wisconsin* v. *Illinois*, *supra*, was the temporary permit issued in 1925 (see Special Master's Report, p. 73), after the defendants in the *Sanitary District* case (266 U.S. 405) had been enjoined from diverting more than the amount actually and affirmatively permitted by the Secretary of War. The temporary permit unquestionably authorized a diversion which, if allowed to continue, would seriously damage the existing navigable capacity of the Great Lakes. It was conditioned upon removal by the Sanitary District of the cause of the excessive diversion by the construction of sewage disposal works. It rested for its validity, not upon the ground that the diversion would cause no injury to navigable capacity, but upon the ground that the diversion was affirmatively necessary to protect navigation in Chicago harbor from the deleterious effect of the sudden deposit of sewage inevitable if the preëxisting excess diversion were to be suddenly curtailed. Such a permit is in its essence separate and apart from a permit of the type granted earlier in the history of the Chicago diversions. The 1925 permit, though

temporary in character, rested on the affirmative necessity of action to protect navigation; the earlier permits, like those applied for in the case at bar, were little more than evidence of a determination by the Secretary of War, acting in accordance with his duty under section 10, that the diversions authorized would not in fact impair the navigable capacity of existing waterways. This Court, upon a bill in equity brought by States actually and substantially injured by the diversion, recognized that it was inequitable that the Sanitary District should create by its own wrong a situation which gave validity to a permit from which the District received great benefit (see opinion, *Wisconsin* v. *Illinois*, *supra*, p. 17). It therefore made provision for a decree which would bring about as rapidly as possible a restoration of the preëxisting navigable capacity of the Lakes without causing undue suffering and hardship to the people of Chicago; thus virtually doing precisely what the Secretary of War was endeavoring to do by the conditions imposed in the 1925 temporary permit.

The net result of the case of *Wisconsin* v. *Illinois* would seem to be, briefly:

1. To sustain the jurisdiction of the Secretary of War to make the determinations required of him by section 10 both—

(*a*) as to waiving objections, so far as public interest in navigation is concerned, to diversions which do not unreasonably interfere with existing navigable capacity, and—

(*b*) as to the necessity of action affirmatively in aid of navigation.

2. To protect those States having an interest in the maintenance of navigation in their enjoyment of previously existing navigable capacity—

(*a*) by enjoining unauthorized diversions;

(*b*) by treating as unauthorized diversions, diversions originally proper (as not affecting navigation) which have

been exceeded, thus creating an obstruction to navigable capacity which can be removed only by a cessation of both authorized and unauthorized diversions.

The case of *Wisconsin* v. *Illinois* has been examined here at such length only because the interpretation therein contained of section 10 is the most recent and most comprehensive yet undertaken by this Court. The case at bar depends upon the determination of what powers Congress has delegated by section 10 to the Secretary of War and to the Chief of Engineers, and we contend that the *Wisconsin* case in no way casts doubt upon the conclusion reached in the earlier case of *Sanitary District* v. *United States*, 266 U.S. 405. That case treated as duly authorized by Congress such diversions as were approved by the Secretary of War and the Chief of Engineers because of a determination that such diversions would have no adverse effect on navigable capacity. This was the view of *Sanitary District* v. *United States*, taken by this Court in *Wisconsin* v. *Illinois*, *supra*, at page 14 (see *supra*, p. 11).

B. The Determination which the Secretary of War and the Chief of Engineers are Required to Make with Respect to the Proposed Ware and Swift Diversions is purely a Determination of the Issue of Fact Committed to Them by Section 10, of whether the Diversions will Cause an Unlawful and Unreasonable Diminution of Navigable Capacity.

It appears from the complainant's motion to join the Secretary of War and the Chief of Engineers as defendants (par. 3) that on November 30, 1927, the Chairman of the Metropolitan District Water Supply Commission of the Commonwealth of Massachusetts filed with the War Department what purported to be a formal application (Motion, par. 3) for a permit to divert water in accordance with the terms of the Massachusetts legislation (see Answer, Ap-

pendix A, pp. 33 to 77). As appears from this letter, or application, the immediate occasion of the application was a suggestion by the District Engineer of the Corps of Engineers that such an application was advisable, and that a permit from the Secretary of War was necessary to make the proposed diversion a lawful diversion. The War Department chose to deal with the application by treating the two proposed diversions separately (Motion, par. 8), and promptly granted a permit or waiver of all objection to the Ware diversion "so far as the interests committed to this department are concerned" (Motion, par. 12). The Chief of Engineers, in his indorsement and recommendation (Motion, par. 12), affirmatively found as a fact that "the proposed diversion of waters in excess of 85,000,000 gallons per day (131 cubic feet) will have no adverse effect on the *Navigable Capacity* of the Connecticut river." This recommendation was approved by the Secretary of War.

The net result of this action by the War Department was to approve substantially the whole of the diversion authorized by the Massachusetts legislation. Certain minor and unimportant limitations upon the extent of the diversion, as authorized by the Massachusetts Legislature, were imposed by the War Department. [Whereas the Massachusetts legislation (St. 1926, c. 375, § 1; Answer, p. 34) authorized the diversion of flood waters from the Ware river, even during the months from June through November in each year, if the State Department of Health approved, the War Department did not approve any diversion during the period from June 15 through September 15 of each year (Motion, par. 12).]

The application for permission to divert the waters of the Swift river is still pending (Motion, par. 32), and the complainant alleges that the Secretary of War and the Chief of Engineers are prepared to make a similar determination that the proposed diversion of certain of the waters of the Swift river will not impair the navigable capacity of

the Connecticut river, and to notify the Commonwealth of Massachusetts that the Department will interpose no objection, so far as interests of navigation are concerned, to the Swift river project. There is no allegation in the motion that the Chief of Engineers and the Secretary of War, or either of them, were guilty of bad faith in making this decision of an issue of pure fact—an issue of fact which they were obliged to decide by section 10. At the most, the allegations contained in the motion only go to the extent of charging in general terms that the evidence before the Chief of Engineers would have led to a different conclusion. The principal basis of the motion is a mere dislike and disapproval of the conclusions of the Secretary of War and of the Chief of Engineers, without any specific or substantial allegations of facts compelling the belief that the Department was in fact wrong.

It is, of course, clearly unnecessary for the Secretary to deny permission for a present diversion which is not harmful to navigation, merely because at some future date a Federal project in aid of navigation may require, for purposes of storage for use in seasons of low water, the water now proposed to be diverted (see Motion, par. 17). The Secretary is bound to look only at the situation as it exists at the time of granting the application.

> *Louisville Bridge Co.* v. *United States,* 242 U.S. 409, 425.

This Court will not entertain an original bill seeking relief for a fanciful injury conceivably to be suffered in the distant future.

> *New York* v. *Illinois,* 274 U.S. 488, 490.
> *Florida* v. *Mellon,* 273 U.S. 12, 18.

We submit that the motion on its face reveals and admits that the Secretary of War and the Chief of Engineers—

1. Acted in good faith.

2. Made a reasonable, proper, and warranted finding of fact that the proposed diversion from the Ware river would have no adverse effect on navigation.

3. Are prepared to make a similar finding of fact with respect to the Swift diversion.

4. Acted in all respects within the scope of their duty under section 10, which was—

(*a*) to approve or waive objection to the project, though for a purpose not connected with the improvement of navigation, if the execution of the project would have no adverse effect on navigation;

(*b*) to withhold approval if the navigable capacity of existing waterways would be unreasonably impaired by the execution of the project.

These are the acts of the Secretary of War and of the Chief of Engineers which Connecticut seeks to have enjoined and revoked, and as a necessary preliminary to an injunction, both prohibitory and mandatory, she seeks to have those officials joined as parties in this action. Inasmuch as it is the contention of Massachusetts that the determination of the issue of fact by the Secretary of War and the Chief of Engineers made in good faith is not reviewable directly by judicial process, it is necessary to demonstrate precisely how much finality is given by law to that determination.

C. A Determination of an Issue of Fact within Section 10 by the Secretary of War upon Recommendation by the Chief of Engineers is Final if Made in Good Faith. This Court will Not Enjoin the Secretary from Performing his Duty under Section 10 and will not Review the Propriety of his Decision Directly.

The complainant, the State of Connecticut, here seeks a direct review of the accuracy of the determination of the Secretary of War with respect to the effect of the proposed

diversions. The Commonwealth of Massachusetts, for the purposes of the present argument only, raises no question of the standing of the State of Connecticut to seek a judicial determination of the rights of the two quasi-sovereign States *inter se*. That right would seem to be established by the decisions of this Court.

> *Wisconsin* v. *Illinois and Sanitary District*, *supra*, at p. 10 of the Official Advance Sheets, and cases there cited.
> *Kansas* v. *Colorado*, 185 U.S. 125.

In the principal case, so far as the defendant, Massachusetts, should seek to avail itself of the Secretary's determination as an excuse or as a justification for its proposed action, it is probable that this Court, following its action in the case of *Wisconsin* v. *Illinois and Sanitary District*, *supra*, would determine whether or not the Secretary's authorization was valid and issued in accordance with constitutional and statutory requirements. This Court also probably would decide in the principal case whether or not the proposed diversion would constitute a violation of the property rights or other tangible interests of the State of Connecticut or of its citizens. The Secretary's authorization, taken apart from the acts by which the proposed diversion will be accomplished, has no positive effect as a threatened infringement of those interests of Connecticut which are susceptible of judicial cognizance and protection. Nevertheless, Connecticut now demands that the determination of fact which the Secretary is bound to make by the terms of section 10 be enjoined and revoked, though in and of itself that determination cannot take from the Connecticut river a drop of water to which Connecticut may be entitled.

This Court has always held that Congress had full constitutional authority to decide what things constituted ob-

structions to navigation and what things did not. The cases on the subject are comprehensively reviewed in the Report of the Special Master in the case of *Wisconsin* v. *Illinois and Sanitary District* (see pp. 161 to 165). The special master summarizes his conclusions (at p. 164):

> "The question whether such an abstraction should be altogether prohibited, or the extent to which it should be permitted with regard to the interests of navigation, when and in what circumstances and in what amount a diversion of water from the lake would constitute an obstruction to navigation, are questions within the power of Congress to decide in the exercise of its control over navigable waters for the purposes of navigation. When these questions have been determined by Congress, or under its authority validly conferred, they are not open to reconsideration by the court."

When the *Wisconsin* case was decided by this Court, it cut under the rule of law laid down by the master and by the Secretary, for, as we have indicated above, this Court decided, as a matter of equity between two parties (properly before the court acting within its original jurisdiction), that one party could not be allowed, by committing a nuisance, to create a situation which made necessary a remedial permit from the Secretary of War (see *supra*, pp. 15-16). The Secretary in 1925 was faced with a situation of fact and upon that situation made a valid determination in the interests of navigation. This Court in no sense disapproved the propriety of that determination, but held it proper. The court, however, did order that the Sanitary District remove the occasion for its inequitable conduct so that the Secretary would not be forced to a determination which would result in an impairment of existing navigable capacity on the Lakes. The finality of the Secretary's de-

termination upon a given set of facts was, we submit, in no degree questioned, and the language of the *Wisconsin* case (especially at pp. 13-14) gives every indication that this Court approved the conclusion of the special master following earlier decisions of this Court:—

1. That Congress could itself finally determine whether a diversion would obstruct navigable capacity.

2. That Congress could delegate that duty to the Secretary of War and his staff of expert subordinates, who were particularly fitted to make the determination of fact.

3. That the determination made in good faith was not subject to direct judicial review.

The earlier cases raise the problem more directly.

It is, of course, fundamental that the interest of the Federal government in the control of navigable water rests upon the Congressional power to regulate interstate commerce (U.S. Const., art. I, § 8, cl. 3). Indeed, "the right of the United States in the navigable waters within the several States is limited to the control thereof for the purposes of navigation."

> *Port of Seattle* v. *Oregon &c. R. Co.*, 255 U.S. 56, 63.
>
> *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 62, *et seq.*, and cases there cited.

No contention is now made by Massachusetts that the interest of the Federal government in the proposed Ware and Swift rivers diversions extends to anything other than the protection of the general public interest in the maintenance of the navigable capacity of the Connecticut river. We submit that upon the applications for approval of these diversions the whole duty of the Secretary of War and of the Chief of Engineers is to decide whether those diversions would unreasonably impair the navigable capacity of the Connecticut river. If the Secretary should find that they

would adversely affect navigation, it would be his duty to forbid them to the extent that he found them to be excessive. If the diversions are found to be harmless so far as navigation is concerned, it is the plain duty of the Secretary to waive all right to object so far as any claim of the Federal government is concerned. This is substantially what he has done in the case of the Ware river application (Motion, par. 12), and what he is alleged by the complainant, the State of Connecticut, to be planning to do in the case of the Swift application (Motion, par. 32). It is apparent, therefore, that:

1. Massachusetts makes no claim that the Secretary should authorize the proposed diversions—

(*a*) if they substantially injure the navigable capacity of the Connecticut river;

(*b*) upon any contention (based upon the facts apparent upon this record as it now stands) that the proposed diversions are in aid of Federal or State improvements of navigation.

[The Commonwealth of Massachusetts, however, reserves its right to prove in the principal case that the limitations placed upon the diversions, both by the Massachusetts legislation and by the approval about to be granted by the War Department, will result in an increased flow in the Connecticut river during dry seasons, when water is most needed for purposes of navigation, over and above the flow which would normally occur. This will result from the release of stored waters in excess of the actual flow in the Swift river on a considerable number of days each summer. These facts do not appear on this record, and are here stated purely for the purpose of reserving the rights of Massachusetts.]

2. Massachusetts contends that the proper action of the Secretary is in the nature of a waiver of objections based on the absence of any injury to Federal interests, rather than affirmative furtherance of a quasi-Federal project.

We submit, therefore, that the action sought by Massachusetts from the Secretary of War and granted by him, or about to be granted by him, is well within the scope of constitutional action by Congress as delegated to the Secretary by section 10 (*supra*, p. 12). Where the Secretary is acting to aid navigation, or is indicating that there is no injury to the Federal interest therein, his determinations of fact have always been treated as final, so far as Federal interests are concerned, by this Court, and as not subject to judical review.

Pennsylvania v. *Wheeling Bridge Co.*, 18 How. 421, 430, as affecting s.c. 13 How. 518, 625.

South Carolina v. *Georgia*, 93 U.S. 4, 12.

Miller v. *Mayor*, 109 U.S. 385, 393, 395.

Monongahela Bridge Co. v. *United States*, 216 U.S. 177, 195.

Philadelphia Co. v. *Stimson*, 223 U.S. 605, 635, and cases there cited.

United States v. *Chandler-Dunbar Co.*, 229 U.S. 53, 64-65.

Louisville Bridge Co. v. *United States*, 242 U.S. 409.

Southern Pacific Co. v. *Olympian Dredging Co.*, 260 U.S. 205, 210, and cases cited.

The *Monongahela Bridge Co.* case is explicit upon the question. The Secretary of War (the present Chief Justice), acting under section 18 of the Act of March 3, 1899 (30 STAT. AT L. 1151, 1153, U.S. Code, Tit. 33, § 502), had ordered that the bridge there in question be so altered as to render it no longer an obstruction to navigation. A criminal information was filed stating non-compliance by the defendant company with the terms of the Secretary's order and the jury returned a verdict of guilty. By a motion in arrest of judgment the constitutionality of the Act of 1899 was contested. The motion was denied and a fine imposed. This Court upon writ of error held:

1. That the Act of March 3, 1899, laid down a (at p. 192) "general rule, applicable to all navigable waters, that free navigation should not be hampered by unreasonable obstructions . . . ; that . . . Congress charged the Secretary of War with the duty of ascertaining, in each case, . . . whether the particular bridge came within the general rule prescribed; that any other method was impracticable in view of the vast and varied interests of the Nation requiring legislation . . ."

2. That the Secretary must not act in arbitrary fashion, but must give notice and an opportunity to be heard to parties interested, and must allow a reasonable time for alterations. (Parenthetically, it may be here pointed out that there is no allegation in the bill, or pending motion in the case at bar, that the State of Connecticut has not had full opportunity to present all her claims. Paragraphs 5, 6, 8, 9, 10, 11, 13, 14, 15, 16, 26, and 30 of the motion contain allegations which affirmatively show not only a comprehensive study of the whole situation by the War Department, but also that Connecticut has been heard at length by the Secretary and his subordinates at all stages of the proceedings.)

3. That the decision of the Secretary, made in good faith, is final to all intents and purposes and that (at p. 195)—

> "It was not for the jury to weigh the evidence and determine according to *their* judgment, as to what the necessities of navigation required, or whether the bridge was an unreasonable obstruction. The jury might have differed from the Secretary. That was immaterial; for Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. It is for Congress, under the Constitution, to regulate the right of navigation by all appro-

priate means, to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined. Its action in the premises cannot be revised or ignored by the courts or by juries, except that when it provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the courts can see to it that Executive officers conform their action to the mode prescribed by Congress."

II.

No Controversy of a Justiciable Nature Exists between the State of Connecticut and the Secretary of War and the Chief of Engineers.

The motion now pending before this Court seeks to join two important officials of the War Department as parties defendant in an original equity suit between two States of the Union. The purpose of making the Secretary of War and the Chief of Engineers parties is purely that they may be enjoined from performing to the best of their ability duties reposed in them by Congress under a general standard of administrative action—the decision of a pure question of fact upon which their decision is final in the absence of bad faith. Massachusetts contends that the State of Connecticut has no standing either in her proprietary capacity or as *parens patriae* to maintain a bill in equity against these officials, and that, even assuming that Connecticut has in this Court a *locus standi* as party plaintiff as against the War Department, there is no actual or threatened present injury to the complainant by reason of the action or proposed action of the Secretary of War or Chief of Engineers. Connecticut, if she has any remedy, has it, we contend, in this Court upon the principal bill against the Commonwealth of Massachusetts and can there assert the invalidity of any action by the Secretary of War and his subordinates in so

far as that action may be improper, if Massachusetts seeks to make use of such action as a justification or excuse for the proposed diversions.

A. Connecticut as a Property Owner or in any Proprietary Capacity has No Standing to Maintain a Bill against the Secretary of War to Enjoin his Performance of his Duty under Section 10.

Connecticut's standing as an owner of property rests upon the ownership by the State of certain riparian lands along the Connecticut river used for public purposes (Bill, par. 12, p. 6). As such an owner we concede, for the purposes of the argument of this motion, that the State of Connecticut has a standing in an original suit in this Court if a justiciable question is presented by the controversy brought here for decision. It is the contention of Massachusetts that no controversy in which the Secretary of War or Chief of Engineers is a proper party, and which is capable of judicial settlement, is presented in this cause.

It is the settled doctrine of this Court that it has no inherent power—

> "*per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not

merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess."

(Mr. Justice *Sutherland*, speaking for this Court in *Massachusetts* v. *Mellon*, 262 U.S. 447, 488-489.)

See also *Florida* v. *Mellon*, 273 U.S. 12, 16-18.

New Jersey v. *Sargent*, 269 U.S. 328, 330, *et seq.*, and cases cited.

In the case at bar the acts of the Secretary of War and of the Chief of Engineers, as we have shown above (*supra*, p. 26), are in substance and in effect the acts of Congress itself under a valid delegation of power.

Philadelphia Co. v. *Stimson*, 223 U.S. 605, 638.

Louisville Bridge Co. v. *United States*, 242 U.S. 409, 424.

Southern Pacific Co. v. *Olympian Dredging Co.*, 260 U.S. 205, 208, 210, and cases cited.

We submit, therefore, that the determination of the Secretary of War, thus acting for Congress, should receive from this Court the same deference for the valid and *prima facie* constitutional action of a coördinate branch of the govern-

ment, which would be paid to the direct action of Congress itself.

The language of this Court in *Massachusetts* v. *Mellon*, quoted above (*supra*, p. 28), is, we contend, apposite in the case at bar unless Connecticut can show that, by the performance of his duty under section 10, the Secretary of War definitely and immediately threatens some property interest of Connecticut itself (as distinguished from an interest of the individual citizens of Connecticut. We submit that Connecticut has no standing as *parens patriae* in this matter so far as action against the War Department officials is concerned—see *infra*, p. 35). It was upon the basis of a direct and immediate threatened injury to a State property, or *quasi*-sovereign right, that this Court took jurisdiction of a truly justiciable controversy in *Missouri* v. *Holland*, 252 U.S. 416. In that case (at p. 431) the *quasi*-sovereign right of the State to regulate the taking of game was held to furnish a sufficient jurisdictional basis (together with the alleged pecuniary interest of the State as owner of the wild birds within its borders) to support a bill seeking to enjoin the enforcement, immediately threatened, of the Migratory Bird Treaty Act by the defendant Federal Game Warden. The bill alleged that the statute was unconstitutional. This Court affirmed a decree dismissing the bill, after deciding that the statute was valid. The acts of the Federal officials there sought to be enjoined were immediately threatened. The *quasi*-sovereign rights of the State and such property rights as the State had were put in immediate jeopardy, for although the Federal statute there questioned might eventually have been held unconstitutional, its enforcement would, if not enjoined, at least suspend temporarily the ability of the State to assert its interests as against the claim of right of a paramount power. Even the basis of jurisdiction, so far as based on property rights inherent in the State, was discredited by this Court (at p. 434). In the language of Mr. Justice *Holmes*: "To put the

claim of the State upon title is to lean upon a slender reed."

The case at bar is clearly distinguishable from the situation in *Missouri* v. *Holland* upon the following grounds:

1. The property interests of the State of Connecticut, though at least as trivial as those considered by this Court in the *Holland* case, are in no immediate danger by reason of the determination of the Secretary of War that the proposed diversions constitute no injury to the navigable capacity of the Connecticut river.

(*a*) That determination, even if wrong in fact, in no way will take from the Connecticut river any water to which the State of Connecticut is entitled as riparian owner (Bill, par. 12, p. 6). The diversion will not be the act of the Secretary of War, even if it takes place. He has merely indicated that, so far as the national interest in the preservation of the navigable capacity of the Connecticut river is concerned, there is no ground for objection to the project. The act which Connecticut alleges is wrongful, and the only act which is seriously alleged to threaten her property, is the proposed diversion by Massachusetts.

(*b*) The rights of Connecticut with respect to that diversion can be fully tried out in the principal case, and Connecticut has, we submit, a full remedy, if indeed she is in any way entitled to relief, as against Massachusetts. In the principal case, so far as Massachusetts may assert that the action of the Secretary of War is an excuse or a justification for any wrongful action, Connecticut may attempt to show that the action of the Secretary was invalid, so far as that action is reviewable in any proceeding. Such consideration was given to the acts of the Secretary of War with respect to the Chicago Drainage Canal.

See *Wisconsin* v. *Illinois and Sanitary District*, *supra*, at p. 16 *et seq.* of Official Advance Sheets.

Sanitary District v. *United States*, 266 U.S. 405, 429-431.

(*c*) So far as Connecticut may seek to treat the action of the Secretary, together with the diversions proposed by the Massachusetts statutes, as a single project threatening the property interests of Connecticut, there are no substantial allegations of fact that the danger of diversion by Massachusetts is in any way immediate (see, however, Bill, p. 11). This appears from an affirmative allegation of the defendant's answer, which has not been denied by Connecticut (Answer, par. 20, p. 23), where it is stated:

> "The defendant further admits that unless enjoined from so doing it intends to proceed with the work authorized by the Great and General Court of Massachusetts in Acts of 1926, chapter 375, and Acts of 1927, chapter 321; that it is proposing to proceed with such work because of the pressing emergency confronting the Commonwealth with respect to providing a suitable, necessary, and adequate supply of water for drinking and domestic purposes for the city of Boston and for the metropolitan district about said city; that unless a supply is furnished within a very short period the inhabitants of the said area in and about the city of Boston will be subjected to grave and serious dangers of epidemic and disease, and that the inhabitants of the said area will have insufficient water to meet their necessary and reasonable requirements for drinking purposes; that the construction of the work proposed for the diversion described herein and authorized by the said acts will take a considerable number of years, and *that the first works for the diversion of the flood waters of the Ware River cannot*, according to the best information at the disposal of the defendant, *in any event be completed before 1931*, and that

until that time no diversion of water from the Connecticut River watershed will be effected by the said works; that by the said diversion, as has been alleged and averred above, only the flood waters of the Ware River, as described in said act, and certain of the waters of the Swift River will be diverted, in no way causing any appreciable diminution in the flow of the Connecticut River at the point where the said Connecticut River enters the State of Connecticut." [Italics ours.]

Even treating the action of the Secretary in waiving all right to object (by the grant of a revocable approval of the Massachusetts project) as merely an important step in the execution of that project, the interests of Connecticut, if any, may be and can be fully protected by an injunction running against Massachusetts alone, for reasons already stated (see *supra*, pp. 30 to 32). In no event is there such threat of present or direct injury by the Secretary of War as should lead this Court to enjoin the Secretary from performing his duty to the best of his ability.

See *Massachusetts* v. *Mellon*, 262 U.S. 447, 488.
Florida v. *Mellon*, 273 U.S. 12, 18.
New York v. *Illinois & Sanitary District*, 274 U.S. 488, 490.
Cf. New Jersey v. *Sargent*, 269 U.S. 328, 330-334.

2. Any title which the State of Connecticut may assert in the case at bar to riparian rights appurtenant to land bordering on the Connecticut river is a title which is subordinate to the Federal easement in all navigable streams for the purposes of furthering and protecting navigable waters.

See *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411, 419.

The Secretary's determination as to whether or not the proposed diversion will constitute an obstruction to the navigable capacity of the river is, as we have stated frequently above (see *supra*, pp. 10, 20), purely a determination as to whether or not the project, if executed, will constitute an injury to this Federal easement. The State of Connecticut, holding title as it does subject to this easement, cannot, we submit, object if the holder of this easement determines in good faith that the proposed project will not injuriously affect the easement.

In the case of *Missouri* v. *Holland*, on the other hand, the claim of title and quasi-sovereign right there asserted was not alleged to be subject to any superior Federal claim with respect to the precise interest which Missouri there sought to protect. Inasmuch as the Constitution of the United States clearly gives to Congress the power to regulate navigable waters as part of its power to regulate interstate commerce, and since Congress, by a delegation of power to the Secretary of War, has assumed control of navigation, such interest as the State of Connecticut may have as a proprietor in the preservation of navigation is, in substance, no different from the same interest which any individual member of the public may have, and we submit that if Congress, through its properly designated agent, determines that a project has no tendency to obstruct navigation, that determination as a finding of fact made in good faith furnishes no ground for judicial relief as against the officers making the determination.

We submit that the following language in the case of *Massachusetts* v. *Mellon*, 262 U.S. 447, at 484, is pertinent to the motion at bar:

> "It follows that in so far as the case depends upon the assertion of a right on the part of the State to sue in its own behalf we are without jurisdiction. In that aspect of the case we are called upon to adjudicate, not

rights of person or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government. No rights of the State falling within the scope of the judicial power have been brought within the actual or theatened operation of the statute and this Court is as much without authority to pass abstract opinions upon the constitutionality of acts of Congress as it was held to be, in *Cherokee Nation* v. *Georgia*, *supra*, of state statutes."

B. Connecticut as a State has No Standing as Parens Patriae Representing the General Welfare of its Citizens to Seek to Enjoin any Determination of the Secretary of War and of the Chief of Engineers Made in Compliance with their Duty Prescribed by Section 10.

It is clear that the State of Connecticut has no standing as *parens patriae* to take action in behalf of its individual citizens or in behalf of its citizens generally because of any injury said to be caused by the Federal government or its duly constituted agents. The citizens of Connecticut are also citizens of the United States and subject to its laws.

Florida v. *Mellon*, 273 U.S. 12, 18.

It is well settled that, with respect to the relations of citizens of the United States with the Federal government, "it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status."

Massachusetts v. *Mellon*, 262 U.S. 447, 485-486.

CONCLUSION.

We submit, for the reasons stated above, that there is no merit in the contentions made in behalf of the State of Connecticut, and that the motion for leave to file the pending motion should be denied. If this Honorable Court should consider the motion upon its merits, we contend that it also should be denied.

It is, of course, true that this Honorable Court may desire to hear argument from counsel representing the Secretary of War and the Chief of Engineers before disposing of the pending motion. In case the court should so wish, we respectfully call the attention of the court to the situation now confronting the Commonwealth of Massachusetts. As set out at length in the answer filed by Massachusetts, a grave and serious emergency confronts the area near Boston (see Answer, pp. 23-24). After careful study the project outlined in the Massachusetts legislation was adopted as the only feasible measure for solving the problem of a water supply for the Metropolitan District (Answer, p. 21). In no event can the first water to be diverted for the use of Boston become available before 1931 at which time the need of water will probably be considerably more pressing even than at present (Answer, p. 23). It is necessary that the engineering work go forward rapidly, with the consequent expenditure of very large sums of money. Naturally Massachusetts does not care to expend millions of dollars upon a project, which has been the subject of inquiry by the Secretary of War, without having his approval of the project, so far as the Federal interest in the protection of navigation is concerned. The pendency of the present motion is the only obstacle standing in the way of Massachusetts in obtaining that approval.

We respectfully request, therefore, that, if the Secretary of War and the Chief of Engineers be ordered by this Honorable Court to show cause why they should not be

joined as parties defendant, the rule or other order issuing to them be made returnable upon some motion day prior to the expiration of the present term of this Court, so that, if possible, the pending motion may be disposed of prior to the adjournment of this Honorable Court.

Respectfully submitted,

JOSEPH E. WARNER, Attorney General of the Commonwealth of Massachusetts.

BENTLEY W. WARREN, Special Assistant Attorney General of the Commonwealth of Massachusetts.

GERALD J. CALLAHAN, Assistant Attorney General of the Commonwealth of Massachusetts.

R. AMMI CUTTER, Assistant Attorney General of the Commonwealth of Massachusetts.